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## What's So New about the New Illegitimacy

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## WHAT'S SO NEW ABOUT THE NEW ILLEGITIMACY?

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INTRODUCTION

Eight months pregnant with my first child, I was recounting to a friend, another African American woman, the flurry of preparations leading up to the blessed event. She interrupted my catalogue of necessary baby-related purchases to ask a burning question: “And you’re now going to take [your husband’s] name, right?” In truth, her question was not a question at all, but rather a statement so self-evidently correct (in her view) that it was almost not worth asking. “No, I’m going to continue to use my own name professionally and socially,” I responded. She was silent for a moment, weighing her words carefully: “Don’t you worry that when you take the baby to school, or to the airport, or wherever, people are going to look at you, see that you and the baby have different surnames and assume you’re not married? That you had a child out of wedlock? That you’re a stereotype?”

In the years since I had that conversation, I had not given it much thought. After all, though I had made the (perhaps) unorthodox choice of keeping my name, I was married and my child had been born in wedlock. More importantly, after a series of critical Supreme Court decisions in the 1960s and 1970s, illegitimacy appeared to have lost some of its salience as a legal category.

But, as this symposium contends, illegitimacy is making a comeback. In June 2011, the Family Leader, a Christian conservative group, exhorted presidential hopefuls to sign “The Marriage Vow—a Declaration of Dependence upon Marriage and Family.”<sup>1</sup> In its zeal to strengthen American families, “The Marriage Vow” emphasized the importance of the traditional nuclear family and marital fidelity, endorsed the Defense of Marriage Act, and disavowed the expansion of civil marriage to same-sex couples. But it also prominently identified the harms of illegitimacy—and more importantly, linked the proliferation of illegitimate births to African American families, racializing this particular threat to the traditional nuclear family.<sup>2</sup>

But social conservatives bent on bolstering the traditional heterosexual marital family have not been the only ones to emphasize illegitimacy and its perceived harms. The issue of illegitimacy has become pervasive in the debate over same-sex marriage, as this symposium notes. Marriage traditionalists argue that marriage was intended to deal with the problem of

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1. THE FAMILY LEADER, THE MARRIAGE VOW—A DECLARATION OF DEPENDENCE UPON MARRIAGE AND FAMILY, [www.politico.com/pdf/PPM187\\_marriage.pdf](http://www.politico.com/pdf/PPM187_marriage.pdf).

2. *Id.* (noting that “a child born into slavery in 1860 was more likely to be raised by his mother and father in a two-parent household than was an African-American baby born after the election of [Barack Obama],” and that “over 70% of African-American babies are born to single parents—a prime sociological indicator for poverty, pathology and prison”) (emphasis in original).

illegitimacy and irresponsible procreation, and thus, should be restricted to heterosexual couples. Those who favor marriage equality argue that illegitimacy is an injury foisted upon same-sex couples and their families simply because they are ineligible for civil marriage.

In this Essay, I consider these developments, and ask two questions: First, what are we to make of them? Do these developments signal a retreat from those earlier Supreme Court cases that dismantled the common law tradition in which non-marital births were legally disadvantaged and deeply stigmatized? Put differently, do they suggest a “new illegitimacy” in which non-marital birth status has been resurrected as a salient legal concept? And second, (regardless of how we answer the first question) what are the consequences of the marriage equality movement’s interest in illegitimacy?

The Essay proceeds in four parts. Part I takes up the first question: does the marriage equality movement’s interest in illegitimacy signal the rise of a “new illegitimacy?” Here, I debunk the inherited legal progress narrative that claims that law abandoned the common law’s treatment of illegitimacy and its many legal disadvantages in favor of a more liberal legal regime in which those of illegitimate birth were no longer legally disfavored. In doing so, I review *Levy v. Louisiana*<sup>3</sup> and *Glona v. American Guarantee & Liability Insurance Co.*,<sup>4</sup> the two Supreme Court decisions credited with disrupting the common law tradition disfavoring non-marital births. Though *Levy* and *Glona* struck down legal distinctions between marital and non-marital children, I argue that these cases did not render a seachange in our understanding of illegitimacy. Instead, their effects were more modest, and indeed, can be understood as reflecting a preference for marriage and the marital family.

Part II builds on these insights by discussing a line of cases decided in *Levy* and *Glona*’s wake. These cases, which concern the rights of unmarried fathers to their children born out of wedlock, provide an important lens through which to consider the veracity of the inherited progress narrative that views *Levy* and *Glona* as liberalizing law’s treatment of illegitimacy. Here, I argue that constitutional protections for unmarried fathers and their children have been contingent on adhering to norms forged in the marital family. But more importantly, the unmarried fathers cases demonstrate that an animating concern surrounding law’s treatment of illegitimacy is not solely the vertical parent-child relationship, but also the horizontal sexual relationship between unmarried adults. That is, in these cases, the Court’s decision to credit—or discredit—the rights claims of unmarried fathers is largely contingent on whether or not the

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3. 391 U.S. 68 (1968).

4. 391 U.S. 73 (1968).

petitioner functioned in the manner of a father *and* husband (rather than just as a father). As with Part I's re-reading of *Levy* and *Glona*, the analysis of the unmarried fathers cases demonstrates that the progress narrative associated with illegitimacy is a fiction. Even as law professes to liberalize its treatment of non-marital births, its clear preference for channeling sex and reproduction into the marital family (and those family forms that mimic marital family norms) remains indelible and intact.

Bearing in mind that the narrative that charts the "progress" from the common law tradition to *Levy* and *Glona*, is less progressive than the conventional wisdom would allow, Parts III and IV turn to the contemporary debate over marriage equality. In Part III, I lay a foundation for what follows by considering the racialized character of illegitimacy in the United States. In Part IV, I then discuss the emergence of illegitimacy as a means of challenging prohibitions on same-sex marriage. To do so, I trace the emergence of the illegitimacy as injury argument in marriage equality cases and I explain the underappreciated costs of using illegitimacy to bolster claims for marriage equality.

#### I. A PROGRESS NARRATIVE?

At common law, children born out of wedlock were legally disfavored—*filius nullius*, the child of no one.<sup>5</sup> Parents had no obligation to recognize their illegitimate offspring or to provide for their upkeep, though this was later amended statutorily to place the duty of care for non-marital children squarely on the shoulders of their unmarried mothers.<sup>6</sup> Vestigial aspects of this common law tradition persisted, even on this side of the Atlantic, well into the twentieth century.

But according to the inherited narrative, all of this changed in 1968 when the U.S. Supreme Court decided *Levy v. Louisiana* and *Glona v. American Guarantee & Liability Insurance Co.* Together, *Levy* and *Glona* have been understood to represent a transition from the "old" illegitimacy—the common law tradition that imposed serious disadvantages on non-marital children—to a more liberal era where the sins of the parents would not be visited upon the children.<sup>7</sup> But is this inherited narrative—and its rosy

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5. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*447 (1769); see also MICHAEL GROSSBERG, GOVERNING THE HEARTH 197 (1985) (describing how non-marital children were considered *filius nullius* and therefore did not have the same right of support as children born in a marriage).

6. Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 81-82 (2003); Kristin Collins, Note, *When Fathers' Rights are Mothers' Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669, 1683-84 (2000).

7. See *Gomez v. Perez*, 409 U.S. 535, 538 (1973) ("[T]here is no constitutionally sufficient justification for denying [child support to] a child simply because its natural father has not married its mother. For a State to do so is 'illogical and unjust.'");

portrait of legal progress—correct?

This Part challenges this interpretation of *Levy* and *Glon* and the legal progress narrative that it underwrites. To do so, this Part considers afresh the facts and holdings of both cases, and offers an alternative reading that debunks the conventional progress narrative.<sup>8</sup>

#### A. *The Tragedy of Illegitimacy—The Facts of Levy and Glona*

*Levy*'s path to the Supreme Court began on March 29, 1964, when Louise Levy, a single, African American mother of five minor children, died at the Charity Hospital in New Orleans due to the negligence of the attending physician.<sup>9</sup> In *Glon*, Minnie Brade Glona's son was killed in an automobile accident in Louisiana.<sup>10</sup> In both cases, the surviving family members sought to file a wrongful death suit under article 2315 of the Louisiana Civil Code. They were precluded from doing so because, according to the lower courts, they were not included in the statutory definition of "survivors."<sup>11</sup> In both cases, exclusion from the statute's terms turned on a single fact—illegitimacy. Louise Levy's five minor children—all of whom were essentially orphaned upon her death—had been born outside of marriage. Similarly, Minnie Brade Glona's dead son, Billy, was of illegitimate birth.

In the lower courts, Louisiana successfully defended the wrongful death scheme on the ground that it furthered the state's interest in promoting morals and the general welfare, and discouraging out-of-wedlock births.<sup>12</sup> The U.S. Supreme Court, however, disagreed. In *Levy*, the Court emphasized that the right to recover under the wrongful death statute "involve[d] the intimate, familial relationship between a child and his own

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Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) ("[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent."); *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) ("We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment.").

8. This process of re-reading cases against their popular interpretation and meaning should be understood as a distinct analytical method. See Kendall Thomas, *Rouge Et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599, 2607-10 (1992) (providing a rationale for re-reading seemingly settled legal texts).

9. Brief for Appellant at 5, *Levy v. Louisiana*, 391 U.S. 68 (1968) (No. 508), 1967 WL 113865, at \*5.

10. 391 U.S. at 73.

11. LA. CIV. CODE ANN. art. 2315 (Supp. 1967).

12. *Levy v. State*, 192 So. 2d 193, 195 (La. Ct. App. 1966) (upholding the challenged statute).

mother.”<sup>13</sup> Though illegitimate, the Levy children were dependent on their mother, who had cared for them and nurtured them throughout their lives. “[I]n her death they suffered wrong in the sense that any dependent would,”<sup>14</sup> and they were entitled to seek recovery for their loss, regardless of the circumstances of their births. The distinction drawn by the Louisiana courts in interpreting the provisions of article 2315 smacked of “invidious”<sup>15</sup> discrimination, as there was “no action, conduct, or demeanor of [the Levy children]” that was “possibly relevant to the harm that was done their mother.”<sup>16</sup>

In *Glon*, whose facts differed from *Levy*’s in that a parent was seeking recovery for a child’s wrongful death,<sup>17</sup> the Court did not dispute the state’s purported interest in promoting marriage as the foundation of civil society, nor did it challenge the state’s discretion to legislate in the area of non-marital sexual conduct<sup>18</sup>—an authority the Court recently had affirmed in *McLaughlin v. Florida*.<sup>19</sup> Instead, in determining that the statute failed to pass constitutional muster, the Court focused on Louisiana’s incoherent and inconsistent approach to the question of illegitimacy and the regulation of out-of-wedlock births.<sup>20</sup> Such incoherence, the Court concluded, revealed the state’s selective approach to the regulation of “sin”<sup>21</sup>—an approach that violated the Equal Protection Clause because it bore “no possible rational basis” to the state’s purported interest in furthering marriage and

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13. *Levy*, 391 U.S. at 71.

14. *Id.* at 72.

15. *Id.* at 71.

16. *Id.* at 72.

17. The factual differences between *Glon* and *Levy* are important, as *Glon* squarely confronted the issue of the legal regulation of adult sexuality outside of marriage unmitigated by the question of surviving dependent children. Indeed, in its briefs in *Glon*, Louisiana emphasized the legislation’s role in channeling adult sexuality into marriage:

“Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy state of matrimony; the sure foundation of all that is stable and noble in our civilization.”

Brief on Behalf of Respondents at 15, *Glon v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968) (No. 639), 1968 WL 112853, at \*15 (quoting *Murphy v. Ramsey*, 114 U.S. 15 (1885)).

18. *Glon*, 391 U.S. at 75.

19. 379 U.S. 184, 192-93 (1964) (striking down an anti-fornication statute as a violation of the Equal Protection Clause without questioning the state’s authority to enact laws regulating sexual conduct).

20. *Glon*, 391 U.S. at 74-75 (observing that the state “follow[ed] a curious course in its sanctions against illegitimacy,” and cataloging the inconsistent treatment of non-marital children and their parents throughout the state’s legal regime).

21. *Id.* at 75.

discouraging non-marital births.<sup>22</sup>

*B. An Alternative Narrative—Levy and Glona Revisited*

*Levy* and *Glona* have been credited as a departure from the common law tradition disadvantaging non-marital children. Indeed, the cases and their progeny have stood for the proposition that, for most purposes, law may not punish innocent children for the sins of their parents.<sup>23</sup> But *Levy* and *Glona* should not be seen as orchestrating a massive change in the law's regard for non-marital births. Indeed, even as *Levy* and *Glona* offered tentative protection for illegitimate children and their parents, neither case dislodged the view that the marital family was—and *should* be—favored and encouraged as a matter of public policy. And though they debunked stereotypes about illegitimacy, these cases did not validate the decision to have sex and bear a child outside of marriage.

This aspect of *Levy* and *Glona* becomes more visible when one considers the traditional account of illegitimacy and its consequences. Under the traditional account, having a child out of wedlock is not just an illicit act by itself; it is a testament to the illicit act (or acts) that preceded it.<sup>24</sup> Moreover, the traditional account of illegitimacy imagines a life where non-marital children have little contact with their fathers, who, absent marriage, have few ties to the household and do little to contribute to its financial support.<sup>25</sup> Instead, mothers are assumed to have primary responsibility for non-marital children,<sup>26</sup> and, it is expected, will lack the resources to provide for the care and upkeep of these children.<sup>27</sup> For these

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22. *Id.*

23. See David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 536 (2008).

24. Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 371 (2010) [hereinafter Maldonado, *Illegitimate Harm*] (noting that the stigma of illegitimacy flows in part from disapproval of the parents' sexual behavior).

25. See BRENDA COSSMAN, *SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING* 130-32 (2007) (discussing intuitions regarding unmarried fathers). This view is undoubtedly linked to the common law's treatment of paternal responsibility for illegitimate children. At common law, a putative father had no legal duty to support his "natural" child unless he adopted or otherwise legitimated the child as his own. 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* \*215; see also *Glidden v. Nelson*, 15 Ill. App. 297, 300 (1884) (acknowledging that, absent statutory departures from the common law, the father of an illegitimate child had no legal duty of support); *State v. Tieman*, 73 P. 375, 376 (Wash. 1903) (noting that at common law, absent a statute imposing a duty, putative fathers bore no obligation of support for their illegitimate children).

26. See 2 KENT, *supra* note 25, at \*215 ("[The mother] has a right to the custody and control of [the non-marital child] as against the putative father, and is bound to maintain [the child] as its natural guardian . . .").

27. See Amy L. Wax, Op-Ed., *The Failure of Welfare Reform*, L.A. TIMES, Oct. 22, 2006, at 2 ("[T]he mother-child family is not, and will never be, a viable economic



reasons, illegitimacy often is imagined as engendering an unhealthy, but inevitable, dependence on the public fisc<sup>28</sup>—a dependence that is wholly at odds with the norms of financial independence that the marital family is believed to cultivate.<sup>29</sup>

And perhaps most troublingly, it is argued that children reared outside of the marital family have few examples of a moral, virtuous adult life. Instead, non-marital children are believed to be raised with the view that dependence on public assistance, and sex and parenthood outside of marriage are acceptable, if not unavoidable.<sup>30</sup> As a result, the traditional account of illegitimacy posits a never-ending cycle in which children become heirs to their parents' immorality and lax values.

Critically, this traditional account of illegitimacy was largely absent in the Court's depiction of the plaintiffs in *Levy* and *Glon*. Consider *Levy*, whose facts often have led to the conclusion that the Court's decision was, in part, an attempt to ensure that the sins of the parents were not visited upon innocent children.<sup>31</sup> This is certainly a valid reading of *Levy*, as the Court was particularly attuned to the basic unfairness of discriminating

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unit. A single parent must play two roles—caring for children and earning a living—that wives and husbands traditionally assumed together. As a result, most such families end up poor.”).

28. See, e.g., Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1651-52 (2005) (discussing the 1996 welfare reforms and the attendant effort to promote marriage and reduce out-of-wedlock births in order to limit dependence on public assistance); Press Release, White House, Working Toward Independence, (Feb. 26, 2002), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/02/welfare-reform-announcement-book-all.html> (noting “the historic increase in non-marital births that have contributed so heavily to the Nation's domestic problems including poverty, violence, and intergenerational welfare dependency”).

29. See Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 46 (2012) [hereinafter Murray, *Marriage as Punishment*] (discussing the marital norm of financial independence from the state). It is worth noting that, as part of the effort to end welfare, the federal government paid states “illegitimacy bonuses” in an effort to reduce illegitimacy, and concomitantly, intergenerational dependence on public assistance. See Personal Responsibility and Work Reconciliation Act, Pub. L. No. 104-193, § 403(a)(2)(c)(i)(I), 110 Stat. 2105 (1996) (codified at 42 U.S.C. § 603).

30. See Charles Murray, Op-Ed., *The Coming White Underclass*, WALL ST. J., Oct. 29, 1993, at A14 [hereinafter Murray, *The Coming White Underclass*]. In 1995, Senator Kay Bailey Hutchison credited this logic, describing the American welfare system as “a self-perpetuating monster that sustains the most distressing ills of our society—illegitimacy, the disintegration of the family, weakening of the work ethic, and crippling dependency.” See Holloway Sparks, *Queens, Teens, and Model Mothers: Race, Gender, and the Discourse of Welfare Reform*, in RACE AND THE POLITICS OF WELFARE REFORM 171, 182 (Sanford S. Schram et al. eds., 2003) (quoting Senator Hutchison).

31. See Richard L. Brown, *Disinheriting the “Legal Orphan”: Inheritance Rights of Children After Termination of Parental Rights*, 70 MO. L. REV. 125, 158 (2005) (citing *Levy* as exemplary of the Court's “impatience with statutes that punish innocent children for the wrongdoing of their parents”).

against a child based on no “action, conduct, or demeanor of theirs.”<sup>32</sup> But curiously, though the *Levy* decision vindicated the rights of Louise Levy’s children to bring a wrongful death claim, the Court—and the briefs supporting the children’s claim—spent a good deal of time recounting Louise Levy’s conduct as a mother.

Though Louise Levy’s maternal conduct arguably had little relevance to the merits of her children’s underlying equal protection claim, the Court noted that she “treated [her five non-marital children] as a parent would treat *any other child*”<sup>33</sup>—including children born and raised within marriage. The five children lived with Levy, and she—and she alone—supported them through her work as a domestic servant, without resort to the public fisc.<sup>34</sup> Perhaps most impressive to the Court (and to the children’s lawyers, who mentioned it repeatedly in their briefs) was the fact that Louise Levy took all five children to church “every Sunday and enroll[ed] them, at her own expense, in parochial school,” rather than relying on public school for their education.<sup>35</sup> The Court’s emphasis of these facts presents an implicit message—regardless of their mother’s sexual history, the Levy children were no ordinary bastards, at least as far as the traditional account of illegitimacy was concerned. They were not reliant on the public fisc,<sup>36</sup> and their mother emphasized strong moral and religious values.

Critically, the Court did not speculate about Louise Levy’s own sexual practices—we are never told whether her children were fathered by the same man or by different men, nor do we know about her intimate life at

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32. See *Levy v. Louisiana*, 391 U.S. 68, 72 (1968).

33. *Id.* at 70 (emphasis added).

34. See *id.* at 72. In this way, Levy was fulfilling both a maternal and a paternal role in her family. Moreover, unless she was an unusually well paid domestic worker, she was likely relying on help from extended family and friends to care for her children. See Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 391-92 (2008), [hereinafter Murray, *The Networked Family*] (discussing the reliance on caregiving networks in economically challenged families).

35. 391 U.S. at 70.

36. See Murray, *Marriage as Punishment*, *supra* note 29, at 45 (discussing marital norms of financial independence). The connection between marriage and financial independence from the state is not a new phenomenon. See Laura F. Edwards, “*The Marriage Covenant Is at the Foundation of all Our Rights*”: *The Politics of Slave Marriages in North Carolina After Emancipation*, 14 LAW & HIST. REV. 81, 92 (1996) (noting that the post-bellum emphasis on marriage “was inextricably tied to other issues, the most prominent of which was the fear that freedpeople would not support themselves economically”); Katherine M. Franke, *Taking Care*, 76 CHI.-KENT L. REV. 1541, 1549 (2001) (describing the Reconstruction Era project of assimilating newly freed African Americans into the norms of the marital family—a project that “was motivated, in significant part, by a desire to privatize dependency”); Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885, 1886-87 (1998) (discussing the recognition of common-law marriage as a means of privatizing the dependency of women and children).

the time of her death. Instead, the Court focused on other, seemingly irrelevant, details of Levy's life, such as her insistence on regular church attendance and parochial school education.<sup>37</sup> The emphasis on these apparently trivial details might gesture towards a number of things. On the one hand, it could suggest that the Court inferred from Levy's religious life that she was celibate (or at least monogamous), devoting herself entirely to her children's care and upkeep. It could also mean that the Court inferred from these facts that the Levy children were unlikely to succumb to the cycle of illegitimacy and immorality. Though born outside of marriage, their strong religious foundations suggested that they were equipped to pursue disciplined, moral lives, rather than buckle under the cycle of poverty, dependence, and immorality with which illegitimacy was associated.<sup>38</sup>

Unlike *Levy*, *Glon* squarely confronted the question of a parent's sin, rather than the more sympathetic facts of a child being punished for his parents' prior behavior. Despite this difference, the Court nevertheless suggested that the facts of *Glon* were distinguishable from the standard account of illegitimacy.

Though Minnie Brade Glona conceded giving birth to a non-marital child in her youth, she was now a married woman who, with her husband, had "informally recognized" her illegitimate son throughout the boy's life.<sup>39</sup> Glona's marital status complicated the elaborate regime of sexual regulation that the state attempted to justify in its brief before the Court. In an effort to counter the claim that Louisiana "engaged in purely prejudicial practices against illegitimates,"<sup>40</sup> the respondents detailed the many procedures by which Louisiana permitted the legitimation of children born outside of marriage.<sup>41</sup> These procedures, the respondents averred, allowed the state to balance its interest in affirming that "legitimate relations form the basis of civilized society," while also providing parents some latitude to legitimate their illegitimate children.<sup>42</sup> Not surprisingly, many of the

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37. See 391 U.S. at 70.

38. See MARY JO BANE & DAVID T. ELLWOOD, WELFARE REALITIES: FROM RHETORIC TO REFORM 80 (1994) (noting the view that when "children [are] raised in homes where welfare is a primary source of income, [they will] find welfare, out-of-wedlock births, and lack of work a normal and largely acceptable fact of life"); Tonya Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 236 (2000) (discussing the intergenerational theory of welfare dependency, which posits that the "negative traits" associated with welfare dependency, including a greater acceptance of out-of-wedlock births, are passed on to successive generations, becoming "a way of life for some families").

39. See *Glon v. Am. Guar. & Liab. Ins. Co.*, 379 F.2d 545, 546 (5th Cir. 1967).

40. Brief on Behalf of Respondents, *supra* note 17, at \*10.

41. See *id.* at \*9.

42. See *id.* at \*10-11.

means for doing so involved the mother of the child “entering into a marriage with the father of the child and . . . formally or informally acknowledging the child” as a child of the marriage.<sup>43</sup>

Louisiana recognized that what had been illegitimate could be cured and made legitimate with marriage.<sup>44</sup> As a married woman,<sup>45</sup> Minnie Brade Glona had in spirit, if not in fact, lived within the bounds of “legitimate relations.”<sup>46</sup> Though she had not married the father of her illegitimate son, and had not taken formal steps to have the child legitimated through an adoption by her and her husband, she *had* married and raised her son within the structure of the marital family.<sup>47</sup> In doing so, she provided her son with a living example of how to live a respectable adult life, and importantly, she, like Louise Levy, appeared to defy the established script for unmarried mothers.

I raise these facts to suggest that the Court may have understood the circumstances of *Levy* and *Glona* to be a departure from the standard account of illegitimacy, and therefore worthy of constitutional protection.<sup>48</sup> The petitioners in *Levy* and *Glona* succeeded not because the Court was keen to remove all distinctions between legitimate and illegitimate births,<sup>49</sup> but because it was crediting the degree to which Louise Levy and Minnie Brade Glona (and their families) were, despite their illegitimate pasts, comporting with marital family norms.

More importantly, we might read the Court’s emphasis of certain facts in its disposition of these cases as having a thicker normative dimension.

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43. *Id.* at \*10.

44. See Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 776-77 (2006) (discussing marriage’s ability to “cure” illicit sex).

45. The Court was certainly aware of Glona’s marital status, as it was referenced in the litigants’ briefs submitted to the Court. In their brief, Glona’s lawyers referred to her as “Mrs. Minnie Brade Glona.” See Supplemental Brief for Petitioner, *Glona v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968) (No. 639), 1968 WL 112852 (emphasis added). The respondents’ brief named Glona’s husband, identifying her as a married woman. See Brief on Behalf of Respondents, *supra* note 17, at \*10.

46. Brief on Behalf of Respondents, *supra* note 17, at \*10.

47. Meaningfully, Glona’s deceased son was known as “Billy Glona,” suggesting that he had assumed his stepfather’s name, and though he had never been formally legitimated by his mother and her husband, that he was regarded as a member of their marital family. See *Illegitimacy*, THE FREE LANCE-STAR (Fredericksburg, Va.), May 21, 1968, at 19 (referring to Glona’s son as “Billy Glona”).

48. Indeed, as Serena Mayeri has noted, Glona and the Levy children were specifically selected to front the litigation, suggesting that the advocates bringing the case were well aware of the way that the facts of each case departed from the traditional account of illegitimacy. See Serena Mayeri, *What’s Wrong With Illegitimacy?: A Brief History* (unpublished manuscript) (on file with author).

49. And indeed, the facts of *Glona*, which pitted an adult’s sexual past against the state’s interest in regulating sex and morality, belie such a facile reading. See *Glona v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73, 75 (1968).

Recall the 2003 case, *Lawrence v. Texas*,<sup>50</sup> in which the Court invalidated a Texas law criminalizing same-sex sodomy. There, the majority opinion depicted the two petitioners, John Geddes Lawrence and Tyron Garner, as though they were a long-term couple living a life in common.<sup>51</sup> In fact, Lawrence and Garner were not a couple at the time of the arrest.<sup>52</sup> Although it is possible that Justice Kennedy, who wrote for the *Lawrence* majority, was unaware of the precise details of the facts, some have suggested that his depiction of Lawrence and Garner as a couple was intended to establish this type of monogamous, coupled intimacy as the norm for same-sex sexuality.<sup>53</sup>

*Levy* and *Glon* might be read along similar lines. In focusing on Louise Levy's financial independence and strong religious ethic, and Louisiana's procedures for legitimating non-marital children, which Minnie Brade Glona had complied with in spirit, though not in fact, perhaps the Court was attempting to establish a norm for the types of illegitimate families it would credit and protect. Constitutional protection is available to those who behave like Louise Levy and Minnie Brade Glona—women who, despite their earlier missteps, rehabilitated themselves and comported with many of the norms of respectability and discipline associated with the marital family. Protection for those who fail to observe these norms, and instead behave in the manner typically associated with unwed mothers, is less certain.<sup>54</sup>

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50. 539 U.S. 558 (2003).

51. See *id.* at 567 (noting that the couple was engaging in anal sex in furtherance of "a personal bond that is more enduring").

52. See, e.g., Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1478 (2004) ("Lawrence and Garner may have been occasional sexual partners, but were not in a long-term, committed relationship when they were arrested."); Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1408 (2004) [hereinafter Franke, *Domesticated Liberty*] (noting that neither the facts of the case nor the briefs offered anything that would suggest that Lawrence and Garner were in a long-term relationship); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1305 (2008) ("Although there was scant evidence for it, Kennedy's opinion speaks of Lawrence and Garner as though they are long-term partners sharing a life in common.").

53. See Teemu Ruskola, *What's Left of Sodomy After Lawrence v. Texas?*, 23 SOC. TEXT 235, 241 (arguing that the *Lawrence* Court announced an archetype for legitimate same-sex sex and relationships).

54. This has been borne out in other cases concerning illegitimacy. See *Lalli v. Lalli*, 439 U.S. 259 (1978) (denying the claim of an illegitimate child to his father's estate where father had a legitimate, marital family that stood to inherit); *Labine v. Vincent*, 401 U.S. 532 (1971) (denying intestacy claim of illegitimate child whose parents did not evince nuclear family norms); *Trimble v. Gordon*, 430 U.S. 762 (1977) (same); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (crediting illegitimate children's claim to workman's compensation in circumstance where parents, though unmarried, lived together and raised their children). This also has been present in cases concerning the rights of unmarried fathers. See *infra* pp. 400-11. This is not to say that adherence to marital family norms is the sole factor in the disposition of these cases.

Re-read in this way, *Levy* and *Glona* do not necessarily support a progress narrative that heralds the liberalization of sexual mores and a categorical acceptance of illegitimacy. If anything, we might interpret these cases as eliminating some of the burdens of illegitimacy while maintaining a pro-marriage, pro-marital-family impulse.<sup>55</sup>

Critically, *Levy* and *Glona* are not the only cases from this time period that venerate marriage and the marital family over other alternatives. As the following Part discusses, the Court's jurisprudence on the rights of unmarried fathers also involves the question of illegitimacy and the normative preference for the marital family, and in so doing, challenges the inherited progress narrative associated with illegitimacy.

## II. ILLEGITIMACY REDUX—THE UNMARRIED FATHERS CASES

In 1972, just four years after *Levy* and *Glona*, the Supreme Court announced the first decision in a line of cases focused on the parental rights of unmarried fathers.<sup>56</sup> Because these cases did not implicate a claim for some sort of posthumously conferred benefit, as *Levy* and *Glona* had, their focus on the legal recognition of an unmarried father's parental rights appeared not to involve the thornier question of whether such recognition implicitly endorsed illegitimacy and out-of-wedlock sex. Accordingly, this line of cases is not often discussed in tandem with the *Levy* and *Glona* line of cases, which confronts squarely the degree to which the state may legally disadvantage illegitimate birth.<sup>57</sup>

Yet, despite these differences, the unmarried fathers cases share important commonalities with *Levy*, *Glona*, and their progeny. In both lines of cases, the indeterminate legal status of the petitioners' claims stemmed from the parties' location outside of marriage. In *Levy* and

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Indeed, the outcomes also are influenced by the context in which the cases arise—the Court often credits intestacy laws distinguishing between legitimate and illegitimate children, as was the case in *Lalli* and *Trimble*, but seems less willing to credit these distinctions in cases involving financial support of a child, as was the case in *Gomez v. Perez*, 409 U.S. 535 (1974).

55. As Serena Mayeri notes, the architects of the legal challenge to the illegitimacy distinction focused on the harm to children, and consciously avoided challenging marriage's privileged position as the approved site of sexual expression and laws regulating adult sexuality more generally. See Mayeri, *supra* note 48.

56. See *Stanley v. Illinois*, 405 U.S. 645 (1972).

57. The exception to this may be *Stanley*, which is often cited in tandem with *Levy* and *Glona* for the proposition that legal disadvantages associated with illegitimacy have been removed. See Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 604 n. 561 (2001) (citing *Levy* and *Stanley*). But see Robert E. Rhodes, Jr., *On Law and Chastity*, 76 NOTRE DAME L. REV. 643, 684 (2001) (noting that while distinctions between marital and non-marital children were deemed constitutionally suspect in *Levy*, cases like *Stanley* "indicated that [the distinction] was not to be entirely abandoned").

*Glon*a, the inability to bring a wrongful death claim was linked to a non-marital birth. Similarly, in the unmarried fathers cases, the question of the scope and nature of paternal rights was in doubt solely because paternity occurred outside of marriage.

This Part considers the unmarried fathers cases and identifies important linkages between this jurisprudential line and *Levy*, *Glon*a, and their progeny. Specifically, this Part argues that these cases build on *Levy* and *Glon*a's uneven legacy by rendering even more visible the Court's preference for marriage and the marital family over other alternatives. More importantly, these cases make clear what the illegitimacy progress narrative often occludes: that law's concern with illegitimacy is as much about the horizontal relationship between two adults who choose to live their intimate lives outside of marriage, as it is about the vertical relationship between a parent and a child born outside of marriage.

#### *A. Crediting the Rights of Unmarried Fathers*

##### *1. Stanley v. Illinois*

In 1972's *Stanley v. Illinois*,<sup>58</sup> the Court began tentatively to sketch the contours of constitutional protections for the paternal rights of unmarried fathers. For eighteen years, Peter Stanley and his long-term partner, Joan, lived together intermittently and raised three children.<sup>59</sup> When Joan Stanley died, Peter lost not only his life partner, but custody of their minor children as well.<sup>60</sup> Pursuant to Illinois law, the children of unmarried fathers became wards of the state upon the death of their mother.<sup>61</sup> Peter challenged the removal of his children from his custody, claiming that he had never been declared an unfit parent, and that the Illinois law impermissibly distinguished between married and unmarried fathers and unmarried fathers and mothers, in violation of his equal protection rights.<sup>62</sup>

On appeal, the U.S. Supreme Court agreed. Relying on a series of due process cases articulating a parent's right to control the rearing of her children, the Court observed that "[t]he private interest . . . of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."<sup>63</sup> Further, the Court, citing *Levy*, observed that law did not "refuse[] to recognize those family

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58. 405 U.S. 645 (1972).

59. *Id.* at 646.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 651.

relationships unlegitimized by a marriage ceremony.”<sup>64</sup> Reasoning that the bonds between “natural, but illegitimate, children” and their parents “were often as warm, enduring, and important as those arising within a more formally organized family unit,”<sup>65</sup> the Court saw no reason to draw distinctions between the rights of married and unmarried fathers. Though the state’s interest in protecting the welfare of vulnerable children was admirable indeed, it did not require the blanket presumption that all unmarried fathers were “unsuitable and neglectful parents.”<sup>66</sup>

Peter Stanley’s Supreme Court victory has been held out as further evidence of the dismantling of legal distinctions concerning illegitimacy in the 1960s and 1970s.<sup>67</sup> Such a claim, though facially accurate, misses the mark. In concluding that Peter Stanley’s rights had been violated, the Court emphasized Stanley’s conduct within his family unit. Stanley, the Court noted approvingly, was not the sort of negligent, unmarried father contemplated by the Illinois statute.<sup>68</sup> Like Louise Levy and Minnie Brade Glona, Peter Stanley’s conduct departed from the traditional account of illegitimacy, which imagined the unmarried father as an unreliable, unsupportive, and disinterested presence in the lives of his children.<sup>69</sup> Instead, Peter Stanley *was* a strong presence in his children’s lives, living with them and supporting them financially for many years.

But importantly, the Court’s decision in his favor was not solely predicated on Stanley’s conduct vis-à-vis his children; the Court also emphasized the nature of Stanley’s conduct with regard to Joan, the mother of his children. Though they were not married, for most of their eighteen years together, Peter and Joan Stanley had lived together, shared the family’s economic burdens, and co-parented their children together.<sup>70</sup>

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64. *Id.*

65. *Id.* at 651-52.

66. *Id.* at 654.

67. See Storrow, *supra* note 57, at 604 n. 561 (citing *Levy* and *Stanley* as evidence that the law recognizes familial relationships outside of marriage). But see Rhodes, *supra* note 57, at 684 (claiming that although *Levy* deemed differences between marital and non-marital children constitutionally suspect, cases like *Stanley* suggest that the distinction was not completely deserted).

68. *Stanley*, 405 U.S. at 655 (“[N]othing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children.”).

69. See COSSMAN, *supra* note 25, at 130-32 (discussing the standard account of unmarried fathers); Harry D. Krause, *Reflections on Child Support*, 1983 U. ILL. L. REV. 99, 111-12 (1983) (discussing “‘matriarchal subculture’ theories” that emphasize the failure of unmarried fathers to provide economically for their children); Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1007-08 (2006) (noting the perception that unmarried fathers fail to provide financial support to their children).

70. Indeed, the briefs filed in support of Stanley referred to Joan as his “common-law wife.” See Brief for the Petitioner at 7, *Stanley v. Illinois*, 405 U.S. 645 (1972) (No. 70-5014), 1971 WL 134140, at \*7.



Peter had not only behaved like a father; he had behaved like a *husband*.<sup>71</sup> From this perspective, *Stanley* is utterly consistent with *Levy* and *Glon*—but not because it signals broad protections for those who choose to live outside of marriage and their children. Instead, *Stanley*, like *Levy* and *Glon*, is oddly schizophrenic in that its nominal protection for non-marital families is embedded in its implicit veneration of marital family norms.

For some, this reading of *Stanley* may seem discordant. However, if one delves further into the line of unmarried fathers cases, this aspect of *Stanley* becomes even more apparent. From 1978 to 1983, the Court revisited the basic question posed in *Stanley v. Illinois*—what was the nature and scope of an unmarried father’s parental rights? In these cases, *Quilloin v. Walcott*,<sup>72</sup> *Lehr v. Robertson*,<sup>73</sup> *Caban v. Mohammed*,<sup>74</sup> and *Michael H. v. Gerald D.*,<sup>75</sup> the Court elaborated the extent of the Constitution’s protections for the rights of unmarried fathers, and in so doing, underscored a clear preference for marriage over non-marriage, and for the marital family over other alternatives.

## 2. Quilloin v. Walcott and Lehr v. Robertson

In both *Quilloin* and *Lehr*, the Court rejected petitions for paternal rights lodged by two unmarried biological fathers. The facts of the cases were similar: an unmarried father sought to block the adoption of his biological child by the child’s new stepfather.<sup>76</sup> From the start, the Court’s account of the factual circumstances made clear that Leon Webster Quilloin and Jonathan Lehr were not in the same position as Peter Stanley. As the Court recounted, Quilloin and his son’s mother, Ardell Williams Walcott, “never married each other or established a home together.”<sup>77</sup> In the eleven years between the child’s birth and the filing of the adoption petition, Quilloin made no effort to legitimate the boy, despite the fact that Georgia provided statutory procedures for doing so.<sup>78</sup> Although Quilloin and his son had visited “on many occasions,”<sup>79</sup> and Quilloin had provided the child with

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71. See Alice Ristoph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1253 (2010).

72. 434 U.S. 246 (1978).

73. 463 U.S. 248 (1983).

74. 441 U.S. 380 (1979).

75. 491 U.S. 110 (1989).

76. See *Lehr*, 463 U.S. at 250; *Quilloin*, 434 U.S. at 247.

77. 434 U.S. at 247.

78. *Id.* at 249 (“Appellant did not petition for legitimation of his child at any time during the [eleven] years between the child’s birth and the filing of [the] adoption petition.”).

79. *Id.* at 251 (internal punctuation omitted).

“toys and gifts . . . from time to time,”<sup>80</sup> he had provided financial support “only on an irregular basis.”<sup>81</sup>

Similarly, the Court concluded that the differences between *Lehr* and *Stanley* were “clear and significant.”<sup>82</sup> In stark contrast to *Stanley*, Jonathan Lehr’s relationship with his two-year-old daughter was “inchoate.”<sup>83</sup> According to the majority, Lehr’s name did not “appear on [his daughter’s] birth certificate,” and he “did not live with [mother and child] after [the child’s] birth.”<sup>84</sup> Perhaps even more troubling, in the Court’s view, was the fact that Lehr “never provided them with any financial support, and he . . . never offered to marry [the child’s mother].”<sup>85</sup> Indeed, Lehr failed to enter “his name in [New York’s putative father] registry,” thereby failing to observe the most minimal requirements for acknowledging paternity.<sup>86</sup>

In both cases, the Court concluded that the proposed adoption could proceed over the biological father’s objections, and that such action did not violate either father’s constitutional rights.<sup>87</sup> In rejecting the unmarried fathers’ claims, the Court acknowledged the fundamental nature of parental rights,<sup>88</sup> but noted the limits of biology in establishing paternal rights. In *Quilloin*, for example, the Court observed that “the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.”<sup>89</sup> But *Quilloin*, the Court reasoned, did not present these difficulties because Quilloin’s relationship with his son did not constitute a “natural family” entitled to legal protection. Quilloin had never sought legal custody of his son, and the proposed adoption did not seek to place the child with a new set of parents with whom the child had never lived. Indeed, validating Quilloin’s claims would prompt the “breakup of a natural family,” as the challenged adoption by the boy’s mother and stepfather would “give full recognition to a family

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80. *Id.* (internal punctuation omitted).

81. *Id.*

82. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

83. *Id.* at 250.

84. *Id.* at 252.

85. *Id.* Indeed, the child’s mother married Richard Robertson eight months after her daughter’s birth. *Id.* at 250.

86. *See id.* at 251.

87. *Id.* at 267-68; *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978).

88. *Quilloin*, 434 U.S. at 255 (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.”) (citations omitted).

89. *Id.* (internal punctuation omitted).

unit already in existence.”<sup>90</sup>

Like Quilloin, Jonathan Lehr’s biological ties also were insufficient to perfect his paternal claims because he failed to live up to the expectations of fatherhood—expectations that, in the Court’s view, were inextricably intertwined with the marital family. Not only had Lehr “never supported and rarely seen”<sup>91</sup> his daughter during her short life, as in *Quilloin*, there was another man who *had* served as a father figure, providing for the girl’s economic upkeep—her mother’s husband. Richard Robertson had married the girl’s mother and, in the context of his role as a husband, he was also functioning as a de facto father. And importantly, he wished to be vested with legal rights as a father by adopting the girl, an act that would legitimate her.<sup>92</sup> Accordingly, recognizing Lehr and Quillion’s paternal rights had consequences. Crediting the paternal claims of these itinerant unmarried fathers would obstruct a stepparent adoption, imperiling the opportunity for both children to be raised as a legitimate child of the marital family formed by the mother and stepfather—something that, in the Court’s view, was preferable to the prospect of the children’s continued illegitimacy.<sup>93</sup>

At first glance, it is hard to reconcile *Quilloin* and *Lehr* with *Stanley*. In all three cases, a biological father pressed his claim for legal recognition as a parent—but with strikingly different outcomes. What unites the three cases is the Court’s attention to the petitioners’ performances as fathers and its prioritization of the marital family. According to the Court, an unmarried biological father’s rights were entitled to constitutional protection only where the father “demonstrate[d] a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child.”<sup>94</sup> This demonstrated commitment could be clearly communicated through marriage to the child’s mother. Alternatively, however, this kind of commitment might be demonstrated in circumstances like Peter Stanley’s, where there was no *formal* marriage, but the parties functioned, for most purposes, in the manner of a marital family.<sup>95</sup> Either

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90. *Id.*

91. *Lehr*, 463 U.S. at 249. Lehr vehemently resisted this characterization. By his account, he had visited his daughter and her mother in the hospital during the mother’s confinement. *Id.* at 269 (White, J., dissenting). He further claimed that from the time of their discharge from the hospital, his daughter’s mother had “concealed her whereabouts from him,” making it difficult for him to visit his daughter regularly. *Id.*

92. *Id.* at 250.

93. *See id.* at 256–57 (“The institution of marriage has played a critical role . . . in defining the legal entitlements of family members . . . . [Accordingly,] state laws universally express an appropriate preference for the formal family.”).

94. *Id.* at 261 (internal punctuation omitted).

95. To be clear, of these alternatives, courts have preferred marriage, as opposed to marriage-like behavior. *See Ristorph & Murray, supra* note 71, at 1252.

way, absent marriage's demonstrated commitment or its proxy, the existence of a biological link alone did not "merit . . . constitutional protection,"<sup>96</sup> especially in the face of a stepfather's petition to legitimate the child through adoption.

The Court justified its stance by noting that the "importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of *daily association*, and from the role it plays in 'promot[ing] a *way of life*' through the instruction of children as well as from the fact of blood relationship."<sup>97</sup> Again, the Court's meaning was obvious—at least by reference to its earlier jurisprudence. The "daily association" and "way of life" that the Court cited referred directly to an institution that it had declared "sacred" and "noble" only eighteen years earlier: marriage.<sup>98</sup> The important aspects of the familial relationship that justified strong constitutional protections for parents' rights were not merely incident to the fact of procreation. They were bonds forged in the context of the marital family—or families that approximated the marital family in form or function. For fathers this meant participating in the lives of their children by living with them and privatizing the household's dependency by providing economic support—acting like a *husband*, as well as like a father.<sup>99</sup>

But importantly, the Court's prioritization of a particular kind of fatherhood was not about the desirability of marriage and the marital family alone. As the Court's disposition of another case in the unmarried fathers line, *Caban v. Mohammed*, suggests, it also was about the undesirability of non-marriage and its consequences, including illegitimacy.

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96. *Lehr*, 463 U.S. at 261.

97. *Id.* (emphasis added).

98. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an *association* that promotes a *way of life*, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.") (emphasis added).

99. Ristroph & Murray, *supra* note 71, at 1253 (noting "[t]he close association of legally cognizable fatherhood with the marital family"). The Court's account of marital family fatherhood is dependent on comportment with the traditional male breadwinner model. This model, however, is at odds with recent pressures for fathers to undertake caregiving obligations that historically have been gendered female. Donna St. George, *Fathers Are No Longer Glued to Their Recliners; Child-Care, Housework Hours Increase*, WASH. POST, Mar. 20, 2007, at A11 (showing a dramatic increase in time spent by men in childcare between 1965 and 2003). The disjunction between the Court's understanding of fatherhood and more recent social pressures warrants closer scholarly attention.

### 3. *Caban v. Mohammed*

The Court's 1979 disposition of *Caban* is entirely consistent with *Stanley*, *Lehr* and *Quilloin*. Like *Quilloin* and *Lehr*, *Caban* involved an unmarried father's claim for paternal rights in the face of an adoption petition lodged by his children's mother and stepfather.<sup>100</sup> Importantly, however, Abdiel Caban prevailed where Jonathan Lehr and Leon Quilloin did not because he, like Peter Stanley, performed fatherhood in a way that was legible to the Court. In short, Caban defied the established script for unmarried fathers. He had been a consistent presence in the lives of his two children. And as the Court reported, he performed fatherhood against the backdrop of a marriage-like relationship with Maria Mohammed, his children's mother. Caban and Mohammed "lived together," "represent[ing] themselves as being husband and wife, although they never legally married."<sup>101</sup> During this time, Caban "lived with the children as their father," contributing to the family's support.<sup>102</sup>

And interestingly, though *Caban*, like *Quilloin* and *Lehr*, also concerned an unmarried father's objection to the adoption of his children by their stepfather, there was a crucial difference. At the time he challenged the adoption petition, Caban himself was newly married to his wife, Nina.<sup>103</sup> Accordingly, crediting Caban's paternal rights was a far easier proposition than had been the case in either *Quilloin* or *Lehr*. Not only had Abdiel Caban performed in the manner of a married father during his children's lives, at the time of his legal challenge, he was a married man capable of shouldering the economic and emotional burdens of a husband and father within the marital family.

In crediting Caban for performing fatherhood in a manner consistent with the marital family, the Court also discredited non-marriage and illegitimacy. Caban's legal claims focused on the statutory distinction between unmarried mothers and fathers, which permitted unmarried mothers the opportunity to object to the adoption of their children, but did not allow unmarried fathers a similar opportunity.<sup>104</sup> One of the state's justifications for the distinction was its concern for "the interests of illegitimate children, for whom adoption often is the best course."<sup>105</sup> Allowing unmarried fathers to block the adoption of their biological children would "have the overall effect of . . . depriving innocent children

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100. *Caban v. Mohammed*, 441 U.S. 380, 382 (1979).

101. *Id.* Until 1974, Caban was married to another woman, from whom he was separated. *Id.*

102. *Id.*

103. *Id.* at 383.

104. *Id.* at 386-87.

105. *Id.* at 390.

of the other blessings of adoption,” including ridding them of the “cruel and undeserved” stigma of illegitimacy.<sup>106</sup>

The state’s emphasis on the harms of illegitimacy as a justification for the statutory distinction between unmarried mothers and fathers is perhaps unsurprising.<sup>107</sup> But what is surprising is that, less than twenty years after *Levy* and *Glon*, the Court accepted unquestioningly the validity of these concerns,<sup>108</sup> concluding only that they could not be served by the statute’s gender-based distinction.<sup>109</sup> More striking still is the fact that both the majority and the dissents in *Caban* agreed on this point. According to dissenting Justice Stewart, so great were the harms and stigma of illegitimacy that the state’s interest in “promoting the welfare of illegitimate children”<sup>110</sup> through adoption was properly prioritized above the rights of unmarried fathers.<sup>111</sup> In his dissent, Justice Stevens echoed these concerns. Citing statistics on the growing incidence of

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106. *Id.*

107. Indeed, in other cases concerning illegitimacy, the Court would continue to validate these intuitions about the differences between biological maternity and paternity in forging the requisite bonds to children. *See* *Nguyen v. INS*, 533 U.S. 53 (2001) (upholding an immigration scheme that required unmarried fathers to undertake more steps to confer birthright citizenship on their children than those required for unmarried mothers); *Miller v. Albright*, 523 U.S. 420, 433-34 (1998) (same); *Parham v. Hughes*, 441 U.S. 347 (1979) (rejecting a challenge to a Georgia law that provided that fathers (but not mothers) of out-of-wedlock children could not inherit from their children unless they had legitimated them); *see also* *Rainey v. Chever*, 527 U.S. 1044, 1047-48 (1999) (Thomas, J., dissenting) (dissenting from a denial of certiorari on the ground that “the [s]tate may not ignore a mother’s unique efforts in carrying a child to term . . . when deciding whether she, as opposed to the father, is entitled to inherit from the deceased child’s estate”) (emphasis in original).

108. *Caban*, 441 U.S. at 391 (“The State’s interest in providing for the well-being of illegitimate children is an important one. We do not question that the best interests of such children often may require their adoption into new families who will give them the stability of a normal, two-parent home. Moreover, adoption will remove the stigma under which illegitimate children suffer.”).

109. *Id.* at 389 (“The present case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother. . . . We reject, therefore, the claim that the broad, gender-based distinction of § 111 is required by any universal difference between maternal and paternal relations . . .”).

110. *Id.* at 395 (Stewart, J., dissenting) (“Unlike the children of married parents, illegitimate children begin life with formidable handicaps. They typically depend upon the care and economic support of only one parent—usually the mother. And, even in this era of changing mores, they still may face substantial obstacles simply because they are illegitimate. Adoption provides perhaps the most generally available way of removing these handicaps. Most significantly, it provides a means by which an illegitimate child can become legitimate—a fact that the Court’s opinion today barely acknowledges.”) (internal citation omitted).

111. *Id.* at 397 (Stewart, J., dissenting) (“The Constitution does not require that an unmarried father’s substantive parental rights must always be coextensive with those afforded to the fathers of legitimate children. . . . The decision to withhold from the unwed father the power to veto an adoption by the natural mother and her husband may well reflect a judgment that the putative father should not be able arbitrarily to withhold the benefit of legitimacy from his children.”).

illegitimacy,<sup>112</sup> especially among urban populations,<sup>113</sup> Stevens declared adoption “an important solution to the problem of illegitimacy.”<sup>114</sup>

Taken together, *Stanley*, *Quilloin*, *Lehr*, and *Caban* all confirm law’s preference for the marital family—or families that closely approximate the marital model—over other alternatives. And importantly, all four cases, whether expressly or indirectly, make clear the Court’s stance on illegitimacy. Regardless of the differences in the legal outcomes for each petitioner, the Court affirms, in no uncertain terms, that illegitimacy is undesirable and harmful.

With this in mind, the Court’s disposition of these cases is entirely consistent with the alternate reading of *Levy* and *Glona* advanced in Part I. Like *Levy* and *Glona*, none of these cases should be interpreted exclusively as liberalizing sexual mores and embracing childrearing outside of marriage. Instead, the protection afforded unmarried fathers is, like the protection afforded the *Levy* children and Minnie Brade *Glona*, contingent and cabined. Taken together, these cases all can be read as an endorsement of marriage and the marital family over non-marriage.<sup>115</sup>

Though the unmarried fathers cases confirm my alternative reading of *Levy* and *Glona*, they also gesture forcefully towards something that was less visible in *Levy* and *Glona*. Both *Levy* and *Glona* have come to stand for the proposition that, in most cases, a child should not be punished for the sins of his parents.<sup>116</sup> It is this interpretation of *Levy*, *Glona*, and their progeny that has fueled the view that illegitimacy is largely about the vertical relationship between a parent and child.<sup>117</sup>

The unmarried fathers cases, however, suggest that this view is

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112. *Id.* at 402 n.2 (Stevens, J., dissenting).

113. *Id.*

114. *Id.* Justice Stevens further noted that adoption would confer upon “the thousands of children who are born out of wedlock every day” legitimate status, and would provide them with “opportunities that would otherwise be denied.” *Id.* at 402.

115. But no one should mistake these cases as valuing “marriage-like” families to the same degree as marital families. Though *Stanley* and *Caban* vindicate the rights of fathers who function in the manner of married fathers, the Court is quick to note that the easiest—and preferred—way to perfect one’s paternal rights is to not only *act like* a married father, but to actually *be married* to the child’s mother. *Id.* at 397 (Stewart, J., dissenting) (noting that traditionally, the primary measure for gauging a man’s paternal rights “has been the legitimate familial relationship he creates with the child by marriage with the mother”).

116. *Labine v. Vincent*, 401 U.S. 532 (1971), appeared to retreat from *Levy* and *Glona* by upholding a distinction between legitimate and illegitimate children in Louisiana’s intestate succession law. In a vigorous dissent, Justice Brennan excoriated the majority for “uphold[ing] the untenable and discredited moral prejudice of bygone centuries which vindictively punished not only the illegitimates’ parents, but also the hapless, and innocent, children.” *Id.* at 541 (Brennan, J., dissenting).

117. This focus stems from the strategic decision to challenge illegitimacy laws from a child-centered perspective. See Davis, *supra* note 6, at 98.

incomplete. Though all of the unmarried fathers cases advert to the nature of the unmarried father's relationship with his children, they also deal squarely with the nature of the relationship between the parents themselves. Thus, in *Stanley* and *Caban*, the petitioner's relationship with his minor children is framed against the backdrop of his marriage-like relationship with his former partner. In *Quilloin* and *Lehr*, the petitioners' claims fail because, in the absence of a marriage-like relationship with their ex-partners, they were unable to perform fatherhood in a manner that was constitutionally legible to the Court.

These cases make clear what the illegitimacy progress narrative often misses. Though the vertical parent-child relationship is an important part of the illegitimacy calculus, it is not the exclusive—or even the primary—concern. What also animates the discomfort with illegitimacy is the horizontal relationship between two adults who choose to have sex and relationship outside of marriage.<sup>118</sup> In this way, the harm of illegitimacy is anchored by a persistent skepticism of non-marriage (and all of its consequences) and a persistent veneration of marriage as the normative ideal for adult intimate life.

And it is this insight that makes the Court's 1989 plurality decision in *Michael H. v. Gerald D.*<sup>119</sup> more easily comprehensible.<sup>120</sup> Though the case is recognized as part of the *Stanley* line of unmarried fathers cases, it departs sharply from the text and tenor of its predecessor cases by abandoning any pretense of concern with illegitimacy and the fate of illegitimate children.<sup>121</sup> Instead, a plurality of the Court focused single-mindedly on legal protections for marriage and the marital family over non-marital alternatives.

#### 4. *Michael H. v. Gerald D.*

The facts of *Michael H.* are fairly well known. Carole D. was married to

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118. Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 671 (1993) (noting that an unwed father's relationship with his child's mother is a crucial factor in determining paternal rights).

119. 491 U.S. 110 (1989).

120. Some commentators have viewed the plurality's decision in *Michael H.* as a break from the preceding unmarried fathers cases, emphasizing the plurality's apparent deviation from the biology plus rule. However, as this analysis makes clear, if viewed through the lens of a pro-marriage, pro-marital family impulse, the plurality's view of the facts, and the resulting holding, is entirely consistent with prior precedents.

121. It is also worth noting that the case is not squarely about illegitimacy as a status. Though there was a 98.07% probability that she was sired by her mother's lover, the child in question, Victoria, was born to a married woman during the course of an intact marriage. By law, she was presumed to be the legitimate child of her mother's husband. 491 U.S. at 113-14. Indeed, the plurality opinion expressly concluded that "Victoria is not illegitimate, and she is treated in the same manner as all other legitimate children." *Id.* at 131.



Gerald D. when she became pregnant by Michael H. following an extramarital affair.<sup>122</sup> Victoria, the child of Carole and Michael's affair, grew up in what the plurality dismissed as a "quasi-family,"<sup>123</sup> being raised primarily by Carole with assistance from, at times, Gerald, Michael, and another man, Scott K.<sup>124</sup> In time, Carole and Gerald reconciled and went on to have two other children within their marriage.<sup>125</sup>

The legal challenge involved an evidentiary presumption stating that any child "born to a married woman living with her husband, who is neither impotent nor sterile, is presumed to be a child of the marriage."<sup>126</sup> Because the presumption had not been rebutted by blood tests within the statutorily prescribed two-year period or Carole's stipulation to Michael's paternity, Victoria was, by law, conclusively presumed to be Gerald's child. When the two-year period elapsed, and Carole refused to file the necessary stipulation rebutting the presumption, Michael filed suit seeking legal recognition as Victoria's father.<sup>127</sup> Importantly, Victoria herself was a party to the suit. Represented by a guardian ad litem, she filed a cross-complaint asserting that she was entitled to maintain filial relationships with both Michael and Gerald.<sup>128</sup>

The plurality opinion spent little time considering Victoria's claims,<sup>129</sup> and it easily rejected Michael's claims that biology, coupled with his relationship with Victoria, established his paternal rights.<sup>130</sup> In fact, the bulk of the plurality's decision focused not on the parent-child relationship between Victoria and Michael, or Michael's rights as a biological father, but on the marital relationship between Carole and Gerald.

Though Michael, relying on the earlier unmarried fathers cases, argued that his liberty interest was created by "biological fatherhood plus an established parental relationship,"<sup>131</sup> the plurality dismissed his characterization of the unmarried fathers cases as a "distort[ion]."<sup>132</sup> According to the Court, the thread undergirding these cases was not legal

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122. *Id.* at 113-14.

123. *Id.* at 114.

124. *Id.*

125. *Id.* at 115.

126. CAL. EVID. CODE § 621 (1967) (repealed 1994).

127. *Michael H.*, 491 U.S. at 115.

128. *Id.* at 114.

129. *Id.* at 130-31 ("We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here because, even assuming that such a right exists, Victoria's claim must fail.").

130. *Id.* at 130.

131. *Id.* at 123 (citing *Stanley*, *Quilloin*, *Caban*, and *Lehr*).

132. *Id.*

protection for unmarried biological fathers who had forged a parental relationship with their illegitimate children, but rather legal protection for the “sanctity . . . traditionally accorded to the relationships that develop within the unitary family.”<sup>133</sup> Put differently, these cases protected the “unitary family” from laws that swept too broadly and did not distinguish between those families that accorded with the values and norms of the marital family, and those that did not.<sup>134</sup> And the Court made explicit that though the marital family typified the unitary family, it was not the exclusive model of unitariness.<sup>135</sup> The family in *Stanley*, the Court noted, was “such a family,”<sup>136</sup> despite the absence of a marriage certificate. With this, the Court, more than ten years after its decision in *Stanley*, laid bare the contingent nature of its protection of paternal rights. Stanley and Caban’s claims were vindicated not solely because they acted as fathers to their children, but also because they did so against the backdrop of an adult horizontal relationship that mimicked marriage in important ways.

But if the “unitary” family included non-marital families like the Stanleys, the plurality was clear that the “quasi-family”<sup>137</sup> established by the “extraordinary”<sup>138</sup> facts of *Michael H.* did not. Though the unitary family included “the household of unmarried parents and their children,”<sup>139</sup> it could not be “stretched so far as to include the relationship established between a married woman, her lover, and their child.”<sup>140</sup> Put differently, Michael H. and Carole may have mimicked marriage intermittently during their on-again-off-again relationship, but this non-marital mimicry paled in comparison to—and did not supplant—an actual marriage.

In this way, the Court presented the conflict between marriage and non-marriage as a zero-sum game. “[T]o provide protection to an adulterous natural father is to deny protection to a marital father.”<sup>141</sup> The plurality clearly understood Michael’s attempt to perfect his paternal rights as a challenge to Gerald’s rights as a husband functioning as a father within the context of the marital family.<sup>142</sup> And in such a challenge, the winner was

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133. *Id.*

134. *Id.* (discussing “the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family”).

135. *Id.* at 123 n.3 (“The family unit accorded traditional respect in our society, which we have referred to as the ‘unitary family,’ is typified, of course, by the marital family, but also includes the household of unmarried parents and their children.”).

136. *Id.* at 123.

137. *Id.* at 114.

138. *Id.* at 113.

139. *Id.* at 123 n.3.

140. *Id.*

141. *Id.* at 130.

142. *Id.* at 129 (“Where, however, the child is born into an extant marital family, the

obvious. When presented with an actual marriage, in which the vertical relationship between children and parents is likely to develop, the Court credited marriage and the marital family over non-marriage.

*B. A New Illegitimacy?*

The unmarried fathers cases offer an important counterpoint to *Levy* and *Glon*a—one that usefully complicates the inherited narrative that presents *Levy*, *Glon*a, and their progeny as a part of the liberalization of sexual mores in the 1960s and 1970s. Though the unmarried fathers cases do not confront squarely the validity of legal disadvantages for non-marital births, they are consistent with *Levy* and *Glon*a in that they concern the nature and scope of constitutional protections for those who live and raise children outside of marriage's boundaries. And importantly, these cases clarify the overstated aspect of *Levy* and *Glon*a's legacy of legal progress.

Moreover, the unmarried fathers cases make clear the degree to which the parent-child relationship is dependent upon—indeed, is assumed to be part of—the horizontal relationship between adults who are intimate partners. Accordingly, these cases reveal that much of the discomfort over illegitimacy is rooted in the skepticism of non-marriage and a normative preference for marriage (and to a lesser extent, marriage-like relationships) as the model for adult intimate relationships.

In this way, *Levy* and *Glon*a do not represent the salad days when illegitimacy eclipsed its formerly disfavored status and non-marital children enjoyed the same status as those born within marriage, as the inherited narrative would have us believe. Instead, the unmarried fathers cases help reveal *Levy*, *Glon*a, and their progeny for what they are—a series of cases that offer limited protection for non-marital families, if they comport themselves in a particular way. With this in mind, it is clear that the rumors of the “old” illegitimacy's death have been greatly exaggerated. The *Levy/Glon*a interregnum was not necessarily a more liberal era in law's treatment of illegitimacy, but rather a permutation of the common law tradition in which marriage, the marital family, and marital birth was privileged and prioritized.

With that in mind, let me return to my initial question—does the recent interest in illegitimacy in the context of the same-sex marriage debate signal the renewed salience of illegitimacy as a legal concept? To the extent that the debate over same-sex marriage is, at bottom, a debate over how to define and enact marriage as a social and legal institution, the renewed interest in illegitimacy is entirely understandable. The boundary

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natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter.”).

between legitimacy and illegitimacy is the boundary between marriage and non-marriage. Taken together, Parts I and II of this Essay contend that even after *Levy* and *Glona*, the boundary between those who are in-laws (married or unmarried but comporting with marital family norms) and those who were outlaws (unmarried and not comporting with marital norms) remained intact and salient. Accordingly, the recent interest in illegitimacy merely speaks to an unbroken legal legacy that favors marriage as the model for intimate life.

With all of this in mind, this Essay now shifts to my second question: Even if the emphasis on illegitimacy is consistent with law's preference for marriage and the marital family, what are the consequences of this interest in illegitimacy? In answering this question, the subsequent Parts consider illegitimacy, racial stigma, and claims for marriage equality. Part III first details the way in which illegitimacy has been deeply racialized in the United States. Part IV then explains how illegitimacy has emerged as an issue in the marriage equality debate. It then discusses the unintended, or underappreciated, costs of using illegitimacy to bolster claims for same-sex marriage.

### III. ILLEGITIMACY, RACE, AND STIGMA

As the preceding Part explained, *Levy* and *Glona* do not represent a broad shift in law's understanding of illegitimacy.<sup>143</sup> Instead, both cases are entirely consistent with law's persistent skepticism of non-marriage and its veneration of marriage and the marital family.

Interestingly, despite the prioritization of marriage and the marital family evident in law and everyday life, empirical evidence suggests a wider array of familial models in contemporary society.<sup>144</sup> For example, statistics show that the number of non-marital births has increased substantially since 1960,<sup>145</sup> in large part due to births to cohabiting but unmarried partners.<sup>146</sup> Despite these changes, the stigma of illegitimacy remains as pronounced as

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143. Instead, one might see these cases as emblematic of what Reva Siegel has termed "preservation through transformation." Reva B. Siegel, "*The Rule of Love*": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2184 (1996). That is, they represent a shift in the way we view illegitimate children and their (lack of) culpability, rather than a shift in our view of their parents' "lifestyle" and the normative hegemony of marriage.

144. Murray, *The Networked Family*, *supra* note 34, at 390-94 (discussing the diversity of familial forms).

145. Brady E. Hamilton et al., *Births: Preliminary Data for 2009*, NAT'L VITAL STATS. REPS., Dec. 21, 2010, at 4, available at [http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59\\_03.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59_03.pdf).

146. Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUD. 29, 35 (2000).

ever.<sup>147</sup> The social anxiety and stigma that surrounds single mothers is illustrative. For many, the paradigmatic image of single mothers is the young, African American woman receiving public assistance.<sup>148</sup>

Indeed, the image of the poor, single, African American mother is so indelibly etched into the social consciousness—and is so stigmatized—that women who do not fit this profile, but are raising children outside of marriage, feel compelled to distance themselves from this public face of single motherhood. Consider the rise of the group Single Mothers by Choice (SMC).<sup>149</sup> For these women, many of whom are older, educated, financially secure, and white, the stigma associated with single motherhood is particularly unwelcome.<sup>150</sup> Accordingly, their decision to denominate themselves as Single Mothers by *Choice* is conscious and deeply meaningful.

By underscoring that they are *electing* to have children outside of marriage, they are signaling that they have the wherewithal to raise their children independently of the state (and a man),<sup>151</sup> and, as importantly, that their choice is not the result of promiscuity or immorality,<sup>152</sup> but rather, the product of a conscious, deliberate, decision-making process.<sup>153</sup> The invocation of their *choice* to be single mothers is at once a method for

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147. Maldonado, *Illegitimate Harm*, *supra* note 24, at 347 (“Despite these legal and demographic changes, nonmarital children continue to suffer legal and social disadvantages as a result of their birth status.”).

148. See KRISTIN LUKER, DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY 83 (1996). This vision of the single mother was reinforced by the 1965 Moynihan Report, which attributed the disparity between African Americans and other social groups in the United States to the non-traditional “family structure of lower class [African Americans].” OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP’T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (Mar. 1965) [hereinafter Moynihan Report], <http://www.dol.gov/oasam/programs/history/webid-meynihan.htm>. The image of the unmarried African American mother was further stigmatized in 1976 when presidential-hopeful Ronald Reagan introduced the term “welfare queen” into the lexicon. The term referred to those accused of collecting excessive public assistance payments due to fraud or manipulation, but was broadly construed to apply to poor, African American mothers. See SUSAN J. DOUGLAS & MEREDITH W. MICHAELS, THE MOMMY MYTH: THE IDEALIZATION OF MOTHERHOOD AND HOW IT HAS UNDERMINED ALL WOMEN 183-89 (2005).

149. See SINGLE MOTHERS BY CHOICE, <http://www.singlemothersbychoice.org> (last visited Jan. 21, 2012).

150. Jane D. Bock, *Doing the Right Thing?: Single Mothers by Choice and the Struggle for Legitimacy*, 14 GENDER & SOC’Y 62, 63 (2000) (noting that these single mothers often “inherit the stigma of their poorer younger sisters”).

151. Indeed, SMCs emphasize their ability to provide a comfortable living for their families without enlisting the support of a man or the public. *Id.* at 74-75.

152. *Id.* at 76 (noting that SMCs often go to great pains to make clear that their families are not the products of promiscuity or other illicit behavior, and that “[b]ecause they can afford to provide well for a child, their decision to parent is moral”).

153. *Id.* at 64 (“By appropriating the term *single mother by choice* . . . , midlife middle-class single women implicitly claim their entitlement to make this decision.”).

distancing themselves from the stereotypical welfare queens or teen mothers who lack the means to make such choices, as well as a talisman to shield themselves and their children from the inevitable stigma and judgment that accompanies child-rearing outside of the marital family.<sup>154</sup>

But because illegitimacy involves not just the vertical relationship between parent and child, but also the horizontal relationship between two adults who elect to live outside of marriage, we should understand the voices of those who claim to be Single Mothers by Choice within this broader frame. That is, the decision to have a child outside of marriage means that one is not only departing from an entrenched script about parenting, but that one also is defying an entrenched script that favors marriage as the preferred frame for, and conduit to, parenthood. By choosing to parent alone, these single mothers are refusing to conform to both the established model of parenthood and the established model for adult relationships (at least for now).<sup>155</sup> But importantly, their invocation of their *choice* to do so is meant to clarify that though they are defying these accepted scripts, they are not deviant—or at least not as deviant as their darker, younger, less affluent sisters.<sup>156</sup> They are distinct from these other single mothers who also are bypassing the conventional scripts for married parenthood, but may do so in ways that are more consistent with stock intuitions about illegitimacy.<sup>157</sup>

Importantly, the racialized stigma of illegitimacy is not just an issue for Single Mothers by Choice, who elect to parent alone and wish to have their choice credited and valued, rather than denigrated as deviant. When married people live their intimate lives in ways that depart from marital norms, even legitimacy may seem illegitimate. Recall the personal

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154. *Id.* (noting that the “single mother by choice” label “indicate[s] their place at the top of the single-parent hierarchy and implies that other single mothers do not enter parenthood by choice or, at least, not by a choice as responsible as their own”).

155. Many SMCs claim that they want to be in coupled relationships, but see no reason to forego having children until they find a suitable partner. *Id.* at 71.

156. Of course, some would find their choice to parent alone—without a man—to be deeply deviant in that it defies accepted familial gender norms. For example, in 1992, Dan Quayle attacked Murphy Brown—a *television character*—for her decision to bear and raise a child as a single mother. Critically, Quayle’s disapproval focused on the fact that Brown’s decision “mock[ed] the importance of fathers.” See *Dan Quayle v. Murphy Brown*, TIME, June 1, 1992, at 20, available at <http://www.time.com/time/magazine/Essay/0,9171,975627,00.html>.

More recently, conservative pundit Bill O’Reilly denounced the actress Jennifer Aniston as “destructive to our society.” Aniston, who played a single mother who had conceived via artificial insemination in the movie *The Switch*, stated in an interview that “[w]omen are realizing more and more that you don’t have to settle, they don’t have to fiddle with a man to have that child.” Danny Shea, *Bill O’Reilly: Jennifer Aniston Destructive to Our Society*, HUFFINGTON POST (Aug. 11, 2010), [http://www.huffingtonpost.com/2010/08/11/bill-oreilly-jennifer-ani\\_n\\_678683.html](http://www.huffingtonpost.com/2010/08/11/bill-oreilly-jennifer-ani_n_678683.html).

157. Bock, *supra* note 150, at 64.

anecdote with which this Essay began. When my friend asked me if I planned to assume my husband's name upon the birth of my first child, she was expressing concern about how my departure from conventional marital (and parental) norms would be interpreted by third parties. Her caveats were meant to remind me that with a different surname from my husband and child, I would not be performing marriage and married parenthood in a way that was easily legible to the world. This departure, coupled with my racial identity, might lead third parties to assume that I was an unwed mother—stigmatized as promiscuous, dependent, unrespectable, and worse.

My friend's concerns were animated by the racialized and stigmatized status of illegitimacy, but they also were prompted by marriage's normative priority in our society. Indeed, the two are inextricably intertwined—the racialized stigma of illegitimacy is part and parcel of our ongoing veneration of marriage (and denigration of life outside of marriage), and a history in which African Americans were viewed as hypersexual and their access to marriage was often constrained. To have a child and be respectable requires marriage—or, in the alternative, as the Single Mothers by Choice can attest, an ironclad explanation that dispels (even if it does not eliminate entirely) the negative associations that attend parenthood outside of the marital family.<sup>158</sup>

It is against this backdrop of race, stigma, and a clear preference for marriage and the marital family that we should interrogate the emergence of illegitimacy as a core issue in the struggle to secure same-sex marriage rights. Recently, some of those favoring marriage equality have hitched their wagons to illegitimacy (and all of the social disfavor and disapprobation it conjures up) in order to augment their claims that exclusion from civil marriage is an injury to LGBT individuals, couples, and families. The following Part traces the emergence of this discursive move and its consequences.

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158. As Ralph Richard Banks notes, the stigma of single motherhood is less pronounced when an unmarried African American woman *adopts* a child, rather than bears one out of wedlock. RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN-AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE* 72 (2011). The difference, in my view, can be attributed to the long-standing effort to channel sex and reproduction into marriage. Because adoption does not implicate the prospect of illicit, non-marital sex, it may carry less stigmatic weight. Elizabeth Brandt, *Cautionary Tales of Adoption: Addressing the Litigation Crisis at the Moment of Adoption*, 4 WHITTIER J. CHILD & FAM. ADVOC. 187, 198 (2005) (characterizing adoption as a "solution" to the stigma of illegitimacy); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 900 (2000) (suggesting that adoption is often a means of avoiding the stigma of illegitimacy); Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 137 (1998) (suggesting that the stigma of illegitimacy encourages unwed mothers to give children up for adoption).

## IV. ILLEGITIMACY AND THE SAME-SEX MARRIAGE MOVEMENT

This Part examines the marriage equality movement's use of illegitimacy as a means of bolstering claims for same-sex marriage. To do so, it briefly traces the use of illegitimacy in the marriage equality debate—first by marriage traditionalists objecting to same-sex marriage, and later by those favoring marriage equality. It then argues that the joinder of illegitimacy and marriage equality has important and perhaps unforeseen consequences, including consolidating marriage's privileged position, exacerbating the racialized character of illegitimacy and gay identity, and further marginalizing less normative forms of kinship and belonging.

*A. Illegitimacy and Responsible Procreation—Defending Opposite-Sex Marriage*

In *Goodridge v. Department of Public Health*,<sup>159</sup> the Massachusetts Supreme Judicial Court held that the state's opposite-sex only marriage laws violated the state constitution.<sup>160</sup> In so doing, the decision paved the way for Massachusetts to become the first state in the union to permit same-sex marriage.<sup>161</sup>

Though *Goodridge* is known as the decision that expanded civil marriage to include same-sex couples, it also has a rhetorical legacy that has been used to limit claims for marriage equality in other jurisdictions.<sup>162</sup> In a vigorous dissent to the *Goodridge* majority, Justice Robert Cordy defended the state's opposite-sex only marriage laws as necessary to bring “order to the resulting procreation, and ensur[ing] a stable family structure in which children will be reared, educated, and socialized.”<sup>163</sup> Including same-sex couples in marriage, a legislature could conclude, would have the unintended effect of undermining “marriage's ability to serve [this] social

159. 798 N.E.2d 941 (Mass. 2003).

160. *Id.* at 969.

161. Opinions of the Justices to the Senate, 802 N.E.2d 565, 566-72 (Mass. 2004).

162. See, e.g., *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003); *Morrison v. Sadler*, 821 N.E.2d 15, 24-26 (Ind. Ct. App. 2005); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Lewis v. Harris*, 908 A.2d 196, 221 (N.J. 2006); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *Andersen v. King Cnty.*, 138 P.3d 963, 981 (Wash. 2006); see also Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1, 3-4 (2009) (noting that Cordy's rationale “was taken up” by a number of other state courts considering the constitutionality of opposite-sex only marriage laws).

163. *Goodridge*, 798 N.E.2d at 995 (Cordy, J., dissenting). The facts of *Michael H.* advert to Cordy's logic. There, the child's mother, Carole, was the ultimate irresponsible procreator—she was unfaithful and gave birth to a child sired by her adulterous lover. Nevertheless, the child, Victoria, was considered legitimate solely because she was born during Carole's marriage to her husband, Gerald. See *supra* Part II.A.4 (discussing the facts of *Michael H. v. Gerald D.*).



purpose.”<sup>164</sup>

Scholars have interpreted Cordy’s defense of opposite-sex marriage as conveying the state’s interest in a particular vision of marriage—one that is about transforming irresponsible procreators into responsible sexual citizens.<sup>165</sup> But importantly, this process of transformation depends largely on transforming accidents of illegitimate birth into legitimate, marital births. Thus, Cordy makes clear that responsible procreation begins with a single step: legitimating the child through marriage.

Justice Cordy’s conflation of marriage, legitimacy, and responsible procreation was more fully elaborated in the 2006 decision *Hernandez v. Robles*.<sup>166</sup> There, the New York Court of Appeals upheld that state’s laws restricting marriage to opposite-sex couples.<sup>167</sup> The legislature, the Court reasoned, could rationally conclude that the promotion of heterosexual marriages would best serve the welfare of children because “[h]eterosexual intercourse has a natural tendency to lead to the birth of children” and heterosexual relationships “are all too often casual or temporary.”<sup>168</sup> Accordingly, the legislature could find that marriage was necessary “to create more stability and permanence in the relationships that cause children to be born” and thus the state could offer “an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.”<sup>169</sup>

As with Cordy’s *Goodridge* dissent, *Hernandez*’s vision of responsible procreation is one that takes a dim view of non-marital births. According to the *Hernandez* majority, heterosexual procreation outside of marriage is all too often casual, meaningless, unstable, and impermanent—terms that align neatly with the standard account of illegitimacy. Marriage thus provides a vehicle for these irresponsible heterosexual progenitors to rear their accidentally begotten children in a more stable, committed environment.

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164. *Goodridge*, 798 N.E.2d at 1002 (Cordy, J., dissenting).

165. Abrams & Brooks, *supra* note 162, at 10-12, 32 (discussing the “disciplining” aspect of marriage and noting that most individuals marry “because they think that it is the right thing to do if they want to have children”) (internal quotation marks omitted); Deborah A. Widiss, Elizabeth L. Rosenblatt, & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 495 (2007) (“The ‘responsible procreation’ rationale has been the predominant justification in many of the court decisions denying same-sex couples the right to marry.”).

166. 855 N.E.2d 1 (N.Y. 2006).

167. *Id.* at 12.

168. *Id.* at 7.

169. *Id.*

*B. Illegitimacy as Injury—A Call for Marriage Equality*

The responsible procreation argument has become a standard arrow in the quiver of those opposed to expanding civil marriage to include same-sex couples.<sup>170</sup> But this argument also has engendered a powerful response from some of those favoring marriage equality—one that has shaped the tenor of the debate by emphasizing illegitimacy as an injury visited on those denied access to civil marriage.<sup>171</sup>

Importantly, the rejoinder to the responsible procreation argument is one that actually credits its logic. That is, the marriage equality movement's response does not dismantle the assumptions of marital stability and permanence (and non-marital instability and impermanence) on which the responsible procreation argument is predicated. Instead, the response implicitly affirms the inherent worthiness of marriage relative to the alternative (non-marriage) and the goal of locating reproduction in marriage. It simply insists that the benefits of marriage and marital birth be extended to include same-sex couples and their children.

For example, the *Goodridge* majority responded directly to Justice Cordy's responsible procreation argument by noting that, notwithstanding the "strong public policy to abolish legal distinctions between marital and nonmarital children,"<sup>172</sup> the children of married couples are "the recipients of the special legal and economic protections obtained by civil marriage."<sup>173</sup> Accepting that "marital children reap a measure of family stability and economic security . . . that is largely inaccessible, or not as readily accessible, to nonmarital children," the majority underscored the call for marriage equality by identifying illegitimacy as a collateral harm of

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170. See *Standhardt v. Superior Court*, 77 P.3d 451, 463 (Ariz. Ct. App. 2003) ("Because same-sex couples cannot by themselves procreate, the State could also reasonably decide that sanctioning same-sex marriages would do little to advance the State's interest in ensuring responsible procreation within committed, long-term relationships."); *Morrison v. Sadler*, 821 N.E.2d 15, 25 (Ind. Ct. App. 2005) (concluding that "recognition of same-sex marriage would not further [the state's] interest in heterosexual 'responsible procreation'"); *Andersen v. King Cnty.*, 138 P.3d 963, 982-83 (Wash. 2006) (concluding that procreation is a "legitimate government interest justifying the limitation of marriage to opposite-sex couples"). See also *Abrams & Brooks*, *supra* note 162, at 3-4 (discussing the way in which the responsible procreation argument has been deployed in other jurisdictions).

171. This argument, which I term the "illegitimacy as injury argument," has flourished in *Goodridge*'s wake, but its seeds were sown much earlier—a fact that attests to illegitimacy's disfavored status. In *Baker v. State*, the Vermont Supreme Court emphatically articulated an interest in providing the children of same-sex couples with the legal privileges of legitimacy, and noted the irony of withholding marriage's many privileges simply because a child's parents were two people of the same sex. 744 A.2d 864, 882 (Vt. 1999).

172. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 956 (Mass. 2003).

173. *Id.*

excluding same-sex couples from civil marriage.<sup>174</sup>

Other courts have been even more forthright in their view that children—whether of opposite-sex couples or same-sex couples—should be spared the indignity of illegitimacy. In her dissent from the majority opinion in *Hernandez v. Robles*, Chief Judge Judith Kaye conceded that New York had “a legitimate interest in the welfare of children,” but maintained that the exclusion of same-sex couples from civil marriage “in no way further[ed] this interest. In fact, it undermin[ed] it.”<sup>175</sup> Excluding same-sex couples from marriage deprived their children of the many “tangible legal protections and economic benefits” with which marriage is associated.<sup>176</sup> Withholding these protections from the children of same-sex couples was plainly “antithetical to their welfare.”<sup>177</sup>

For the most part, judicial rejoinders to the responsible procreation argument have focused on the folly of extending the protections of marriage to the children of opposite-sex couples, in the interest of ensuring a stable family structure, while precluding similar protections to children raised by same-sex couples.<sup>178</sup> Perhaps because *Levy* and its progeny have stood for the proposition that the “sins of the parents” ought not be borne by the children,<sup>179</sup> few courts have directly engaged the issue of the stigmatic costs of illegitimacy.

But while courts have been reluctant to confront the stigmatic costs of illegitimacy in their decisions, advocacy groups have had few reservations about doing so in their briefs and arguments on behalf of marriage equality. In a recent complaint filed before a New Jersey trial court, Garden State Equality, an advocacy group for marriage equality, argued that marriage’s benefits were of critical importance to the children of same-sex couples, conferring upon them the legal and social legitimacy associated with the institution.<sup>180</sup> Similarly, in its amicus brief in *Conaway v. Deane*, the

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174. *Id.* at 956-57. As the *Goodridge* majority concluded, excluding same-sex couples from marriage would not necessarily ensure the security of the children born to opposite sex couples, but did “prevent the children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized.” *Id.* at 964 (internal quotations omitted).

175. *Hernandez v. Robles*, 855 N.E.2d 1, 32 (N.Y. 2006) (Kaye, C.J., dissenting).

176. *Id.*

177. *Id.*

178. *See, e.g.*, *Varnum v. Brien*, 763 N.W.2d 862, 901 (Iowa 2009) (“[T]he germane analysis does not show how the best interests of children of gay and lesbian parents, who are denied an environment supported by the benefits of marriage under the statute, are served by the ban [on same-sex marriage].”).

179. *See Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) (“Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.”).

180. Complaint for Declaratory and Injunctive Relief at 27, *Garden State Equal. v.*

challenge to Maryland's opposite-sex marriage requirement, the American Psychological Association spoke directly to the issue of stigma: "[the] stigma of illegitimacy will not be visited upon the children of same-sex couples when those couples can legally marry."<sup>181</sup> The American Academy of Matrimonial Lawyers concurred in their amicus brief in the same case: "[t]he only way to eliminate [the] harms [of illegitimacy] is to allow same-sex parents to marry so children who are born within their marriage are automatically legitimate."<sup>182</sup>

The allure of the illegitimacy as injury argument is obvious given the degree to which children's rights and privileges are linked to their parents' status.<sup>183</sup> But there is something worrisome about the rhetoric of illegitimacy invoked by marriage equality proponents. At the heart of these accounts of illegitimacy as injury is a sense that the injury is patently unjustified. But those who invoke the illegitimacy as injury argument are not concerned with the injuries borne by *all* children born outside of marriage. The concern is reserved for the children of same-sex couples. For those who *can* marry legally, but choose not to do so, the burdens of illegitimacy—for themselves and their children—are the (deserved) costs of that (irrational) choice. The injustice for same-sex couples is that they do not have a choice (at least not in most jurisdictions). They do not *choose* to live and raise children outside of marriage—they are *required* to do so.

In this way, illegitimacy is something that is thrust upon them and their children against their will. And it is the lack of choice—the absence of volition—that rankles. Implicit in the argument is a sense that if same-sex couples raising children could marry, *they would*. They would not hobble their children with the taint of illegitimacy. They would marry and they

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Dow, No. 00000, 2011 WL 2582866, at \*27 (N.J. Super. Ct. Law Div. June 29, 2011) ("Marriage is as likely to benefit the . . . children of . . . same-sex couples emotionally, economically, and legally as it does other children.").

181. Brief of American Psychological Association et al. as Amici Curiae in Support of Plaintiffs-Appellees at 43, *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (No. 44), 2006 WL 3096521, at \*43. In an amicus brief filed in *Andersen v. King County*, the challenge to Washington's opposite-sex marriage requirement, the APA noted that "being born to unmarried parents is still widely considered undesirable." Amicus Curiae Brief of American Psychological Association at 48, *Andersen v. King Cnty.*, 138 P.3d 963 (Wash. 2006) (No. 75934-1), 2005 WL 901986, at \*48.

182. Brief of Amici Curiae in Support of Appellees, Gitanjali Deane & Lisa Polyak, et al., American Academy of Matrimonial Lawyers et al. at 11, *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (No. 44), 2006 WL 3096523, at \*11.

183. See Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion—Legitimacy, Dual-Gender Parenting, and Biology*, 28 LAW & INEQ. 307, 322-23 (2010) (noting that "[w]ell-settled equal protection law mandates that a state may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally," and concluding that "[c]hildren of same-sex couples are in a similar position as the children in [those] cases") (internal quotations omitted).

would build the stable, permanent families with which marriage is associated. They are not like the opposite-sex couples that *can* raise their children in marriage, but do not.<sup>184</sup>

The emphasis on the lack of volition—and the implicit comparison with those couples that do have the choice to marry but do not—also produces another important narrative in the marriage equality movement’s use of the illegitimacy as injury argument. It is not solely that illegitimacy is injurious because it is unfair and unchosen; it is galling because it is *undeserved*. Let me clarify this point by reference to another strategic aspect of the marriage equality campaign: the selection of plaintiffs to front the campaign’s litigation efforts. As some scholars have acknowledged, those selected to front marriage equality lawsuits are carefully selected in an effort to emphasize certain traits and downplay others.<sup>185</sup> By and large, the plaintiffs in these lawsuits are in “long term, committed, marriage-like relationships” in which they are raising children.<sup>186</sup> The selection of these “model” plaintiffs is at once an effort to normalize the claim for same-sex marriage—to underscore that same-sex couples are just like the opposite-

184. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 958 (Mass. 2003) (emphasizing that “[i]ndividuals who have the choice to marry each other and nevertheless choose not to may properly be denied the legal benefits of marriage”).

185. Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 239 (2006) [hereinafter Franke, *The Politics of Same-Sex Marriage Politics*] (discussing the selection of plaintiffs in marriage equality litigation); Douglas NeJaime, Note, *Marriage, Cruising, and Life in Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy*, 38 HARV. C.R.-C.L. L. REV. 511, 545 (2003) (noting that the plaintiffs in *Goodridge* were selected, in part, based on their comportment with heteronormative family ideals). This impulse is not exclusively a strategy for marriage equality. Gay rights litigation, more generally, has operated in this fashion. See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 80 (2006) (“[I]f we look at the gay plaintiffs presented to the courts and the world as the public face of gay rights, we see ‘straight-acting’ men . . . . We see less of Perry Watkins—an African-American army service member with an . . . exemplary service record who performed as the drag queen Simone.”); Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1505-06 (2000) (describing the selection of “representatives for gay and lesbian victimization,” and noting that “[t]he hope was for this strategy to convey that real people—innocent, decent, hardworking people—people who were just like everybody else, were being harmed by military homophobia”) (internal quotations omitted); Jeffrey Schmalz, *On the Front Lines With Joseph Steffan: From Midshipman to Gay Advocate*, N.Y. TIMES, Feb. 4, 1993, at C10 (Steffan, the public face of gay opposition to the “Don’t Ask, Don’t Tell” policy, was an “understated, well-scrubbed boy next door. No one will ever label Joe Steffan a screaming queen.”). A similar strategy of emphasizing respectability was deployed by those advocating for the civil rights of racial minorities during the Civil Rights Movement. See TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* 32 (2011) (noting that black leaders cultivated norms of “respectability” to combat stereotypes justifying discrimination).

186. Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 32-33 (2010); see also Murray, *Marriage as Punishment*, *supra* note 29, at 59 (discussing the selection of marriage equality plaintiffs); Franke, *The Politics of Same-Sex Marriage Politics*, *supra* note 185, at 239) (discussing the selection of “perfect plaintiffs”).

sex couples permitted to legalize their relationships as marriage<sup>187</sup>—and an attempt to amplify the injustice of their exclusion from civil marriage.<sup>188</sup> These couples have assumed the burdens and obligations of marriage, but are precluded from its many benefits.<sup>189</sup> Similarly, the marriage equality campaign's use of illegitimacy as injury challenges same-sex couples' exclusion from marriage by contrasting their conformity with marriage's norms of respectability and discipline with the deviance of those who could marry and do not.

On this account, same-sex couples are not only more proximate to their opposite-sex counterparts, they are more distant from single mothers, deadbeat dads, and anyone who makes the “conscious” decision to bear and raise a child outside of marriage and its norms.<sup>190</sup> In this way, these same-sex couples are not only “perfect plaintiffs,”<sup>191</sup> they are also perfect parents. And those who willfully depart from the marital model and bear and raise children out of wedlock are, by comparison, imperfect and deviant.

### C. *The Costs of the Illegitimacy as Injury Argument*

The foregoing sections described the emergence of the illegitimacy as injury argument in the marriage equality litigation efforts. This move, I contend, is deeply troubling on a number of levels. In the subsections that follow, I consider some of the costs of linking illegitimacy with claims for marriage equality. These costs include the racialization of both gay rights advocacy and illegitimacy, the obsfuscation of structural impediments that may stymie marriage and other forms of valued coupledness among certain groups, and the marginalization of other, less normative, forms of kinship and belonging.

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187. Carbado, *supra* note 185, at 1506 (arguing that mainstream gay advocacy frames same-sex couples as “‘but for’ gay people—people who, but for their sexual orientation, [ar]e perfectly mainstream”).

188. The existence of these couples also demonstrates that marriage is not necessary for stable, long-term relationships.

189. Murray, *Marriage as Punishment*, *supra* note 29, at 59 n.315.

190. Few interrogate the degree to which the decision to raise children as a single parent is truly a conscious choice. Indeed, state policies may lead individuals to “choose” to structure their family lives in ways that depart from accepted norms. For example, man-in-the-house welfare eligibility rules penalized women who lived with male partners (whether married or not) on the ground that these men were either providing financial assistance to the household (and thus, public assistance was unnecessary, or indeed, fraudulently obtained) or that they were not contributing to the household and therefore were not valued. The eligibility rules reflected gendered assumptions of men as economic providers, rather than nurturers, and had the effect of encouraging the proliferation of single mother-headed households. See Onwuachi-Willig, *supra* note 28, at 1684-85. These types of structural impediments to creating and sustaining the marital family are discussed in more detail *infra* Part IV.C.2.

191. Franke, *The Politics of Same-Sex Marriage Politics*, *supra* note 185, at 239.

### 1. Racializing Gay Rights Advocacy and Illegitimacy

One perhaps unappreciated consequence of the joinder of illegitimacy and claims for marriage equality is the racialization of both illegitimacy and gay rights advocacy. As stated earlier, the racial dimensions of illegitimacy and its harms were underscored in the 1960s and 1970s when the Moynihan Report associated the black family's "matriarchal structure" with economic instability and decline,<sup>192</sup> and Ronald Reagan famously invoked the image of the black "welfare queen."<sup>193</sup>

Despite illegitimacy's associations with racial minorities, and with the black community specifically,<sup>194</sup> non-marital births are not an exclusively African American phenomenon.<sup>195</sup> A recent study published by the Centers for Disease Control (CDC) documented the increasing incidence of non-marital births in the United States and abroad, noting that these increases have occurred across all demographic groups.<sup>196</sup> Though the pattern of

192. Moynihan Report, *supra* note 148, ch. IV. As Roderick Ferguson has argued, the Moynihan Report's critique of the black matriarchal family structure was not solely a critique of non-nuclear family forms, but about pressuring blacks to assimilate to norms of economic productivity—a theme that has been reprised in the contemporary neoliberal political agenda. See RODERICK A. FERGUSON, *ABERRATIONS IN BLACK: TOWARD A QUEER OF COLOR CRITIQUE* 119-24 (2004). For further discussion of the neoliberal agenda and its promotion of the nuclear family model, see *infra* Part IV.C.3.

193. See *supra* note 148 (discussing the emergence of the term "welfare queen" and its associations with African American women). Of course, one could argue that the association of racial minorities with illegitimacy preceded both of these political moments. See ANDERS WALKER, *THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS* 70 (2009) (noting that during the Jim Crow era illegitimacy laws functioned as "a type of code for punishing blacks"); RUTH FELDSTEIN, *MOTHERHOOD IN BLACK AND WHITE* 2 (2000) (discussing extant tropes of black motherhood in the New Deal period). In the briefs filed in *Levy v. Louisiana*, for example, lawyers arguing on behalf of Louise Levy's children identified the racialized nature of illegitimacy, suggesting that the challenged law was an impermissible form of race discrimination subject to strict scrutiny. Brief for Appellant, *supra* note 9, at 8-9 (noting that "statutes directed against illegitimacy tend to fall most heavily on Negroes . . . and in some instances may have been designed to achieve this end"). The Court did not take up this aspect of the petitioners' claim in its decision. See Davis, *supra* note 6, at 92 (noting that courts "showed little interest" in the relationship between race and illegitimacy); Mayeri, *supra* note 48 (noting that the Supreme Court did not address the question of whether illegitimacy laws functioned as racial classifications).

194. Joy Jones, *Marriage Is for White People*, WASH. POST, Mar. 26, 2006, at B01 (documenting declining marriage rates among African Americans).

195. Murray, *The Coming White Underclass*, *supra* note 30 (citing high rates of illegitimate births in both white and black women). Indeed, in the 1970s, opponents of racial desegregation often cited higher "illegitimacy" rates among African Americans as a "contagion" that would spread to whites. See SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* 157-58 (2010).

196. Stephanie J. Ventura, *Changing Patterns of Nonmarital Childbearing in the United States*, NCHS DATA BRIEF 1, 3 (2009), <http://www.cdc.gov/nchs/data/databriefs/db18.pdf>; see also Gardiner Harris, *Out-of-Wedlock Birthrates Are Soaring*, U.S. Reports, N.Y. TIMES, May 13, 2009, <http://www.nytimes.com/2009/05/13/health/13mothers.html> (discussing the CDC report on the patterns of non-marital childbirth in the United States).

non-marital births was “particularly pronounced among Hispanic women”<sup>197</sup> in the United States, other countries, many of which were largely monoracial, saw even more dramatic increases in the incidence of non-marital birthrates.<sup>198</sup> In Iceland, for example, over sixty-six percent of children were born to unmarried mothers.<sup>199</sup>

This is not to say that the incidence of non-marital births is not higher among racial minorities in the United States than among whites, but the broader picture is far more complex than the racialized account of illegitimacy would allow. As the CDC study reported, even in the United States there has been a sharp uptick in non-marital births among women between the ages of thirty and thirty-four, suggesting that some women may bear and raise children outside of marriage because of concerns about decreasing fertility,<sup>200</sup> rather than because of some sort of cultural malaise among certain racial subgroups.

This kind of nuance is generally absent from the marriage equality movement’s appeal to illegitimacy as injury. Instead, illegitimacy is presented as a stigmatized position that is unfairly levied upon same-sex parents and their children by virtue of their exclusion from civil marriage. It is an argument used to emphasize the injustice of the exclusion, but in so doing, it also serves to distance same-sex marriage claimants from the social deviants who *could* raise their children as legitimate, but do not.

It is worth noting that although illegitimacy in the United States has a decidedly racialized cast, the marriage equality movement frames its claims in a colorblind register. It never characterizes illegitimacy as an issue associated chiefly with racial minorities. But this colorblind frame might also be problematic.<sup>201</sup> The racial undertones of illegitimacy are well known, as are the racial dimensions of gay advocacy.<sup>202</sup> Just as surely as

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197. Harris, *supra* note 196.

198. *Id.*

199. *Id.*

200. Ventura, *supra* note 196, at 2. Some might read this increase as a progress narrative of its own—one that suggests that women now have greater employment, earning, and childcare options than previous generations of women enjoyed, and thus need not enter into dangerous or otherwise undesirable marriages because of fears of economic vulnerability. They now have sufficient resources to go it alone.

201. See generally Ian F. Haney López, “*A Nation of Minorities*”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 985 (2007) (discussing the perils of colorblindness).

202. See Allan Bérubé, *How Gay Stays White and What Kind of White It Stays*, in THE MAKING AND UNMAKING OF WHITENESS 234, 236 (Birgit Brander Rasmussen et al. eds., 2001) (noting the discrepancy between the racial demographics of the population of gay men and the whiteness of the out gay men who purport to represent the larger group); Carbado, *supra* note 185, at 1499 (arguing that mainstream LGBT groups employ interracial analogies and construct icons of victimization that “convey[] the idea that to be black is to be heterosexual; to be homosexual is to be white”); Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat*



illegitimacy has been associated with poor African Americans, LGBT rights have been associated with affluent whites.<sup>203</sup>

In linking the claim for marriage with illegitimacy, without acknowledging the myriad ways that illegitimacy has been raced and classed, the marriage equality movement distances itself from this marginalized other and her obvious deviance from acceptable family norms. This move mirrors what some scholars have identified as an effort by the mainstream LGBT rights movement to ignore, obscure, or diminish the voices of the racial minorities within its constituency. Russell Robinson and Devon Carbado's critique of the mainstream LGBT rights movement's response to Proposition 8 is illustrative.<sup>204</sup> In the wake of Proposition 8's enactment in California, some mainstream gay rights advocates, like Andrew Sullivan and Dan Savage, roundly denounced the African American community as a crucial factor in the ballot initiative's success.<sup>205</sup> *The Advocate*, a mainstream gay rights publication, crowed in a headline: *Gay is the New Black*,<sup>206</sup> suggesting the irony of a civil rights

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From *Egalitarianism*, 5 STAN. J. C.R. & C.L. 269, 276 (2009) (discussing the association of illegitimacy with the African American community).

203. See Mary Eaton, *Homosexual Unmodified: Speculation on Law's Discourse, Race, and the Construction of Sexual Identity*, in LEGAL INVERSIONS: LESBIANS, GAY MEN AND THE POLITICS OF LAW 46-73 (Didi Herman & Carl Stychin eds., 1995) (arguing that homosexuality is coded as "white" in judicial opinions); Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463, 1467 (2009) [hereinafter Robinson, *Racing the Closet*] (describing the way in which "white gay men have dominated public images of gay men"); Darren Lenard Hutchinson, *Beyond Bullying: Race, Poverty, and LGBT Rights*, DISSENTING JUSTICE (Mar. 28, 2011, 10:52 AM), <http://dissentingjustice.blogspot.com/2011/03/beyond-bullying-race-poverty-and-lgbt.html> ("According to the legend, the average LGBT person is white, wealthy and highly educated."). But see M.V. LEE BADGETT, INCOME INFLATION: THE MYTH OF AFFLUENCE AMONG GAY, LESBIAN, AND BISEXUAL AMERICANS 4 (1998), <http://www.thetaskforce.org/downloads/reports/reports/IncomeInflationMyth.pdf> (debunking the perception of gay affluence).

204. Devon Carbado & Russell Robinson, What's Wrong With Gay Rights? (unpublished draft) (on file with author).

205. Andrew Sullivan, *Prop 8 Exit Polls*, THE ATLANTIC (Nov. 5, 2008, 12:01 PM), <http://www.theatlantic.com/daily-dish/archive/2008/11/prop-8-exit-polls/209015> ("Every ethnic group supported marriage equality, except African-Americans, who voted overwhelmingly against extending to gay people the civil rights once denied them . . ."); Dan Savage, *Black Homophobia*, THE STRANGER (Nov. 5, 2008, 9:55 AM), [http://slog.thestranger.com/2008/11/black\\_homophobia](http://slog.thestranger.com/2008/11/black_homophobia) ("Seventy percent of African American voters approved Prop 8, according to exit polls . . ."). It should be noted that the exit polling data suggesting that the minority vote was determinative in Proposition 8's success has since been refuted. See John Wildermuth, *Black Support for Prop. 8 Called an Exaggeration*, S.F. CHRON., Jan. 7, 2009, at B1 (citing studies that show that "[p]arty identification, age, religiosity and political views had much bigger effects than race, gender or having gay and lesbian family and friends"); PATRICK J. EGAN & KENNETH SHERILL, NAT'L GAY & LESBIAN TASK FORCE, CALIFORNIA'S PROPOSITION 8: WHAT HAPPENED, AND WHAT DOES THE FUTURE HOLD? 11 (2008), [http://hunterforjustice.typepad.com/files/egan\\_sherrill\\_prop8\\_1\\_6\\_09.pdf](http://hunterforjustice.typepad.com/files/egan_sherrill_prop8_1_6_09.pdf) (explaining that support for Proposition 8 can be attributed largely to religiosity, rather than race).

206. Michael Joseph Gross, *Gay Is the New Black*, THE ADVOCATE, Nov. 16, 2008,

crusade thwarted by African Americans.

The scapegoating of the African American community was troubling for many reasons. First, Proposition 8's success was based largely on an appeal to individual rights, like parental autonomy and religious freedom, rather than rampant homophobia among African Americans.<sup>207</sup> Second, as Carbado and Robinson note, the decision to blame African Americans for Proposition 8's success fails to register the position of those LGBT individuals who are also racial minorities.<sup>208</sup> This failure, Carbado and Robinson maintain, is not a new phenomenon within the LGBT rights movement. The movement, they argue, is often inattentive to the needs and desires of racial minorities within its broader constituency, which contributes to the perception of the LGBT rights movement as a movement for privileged whites.<sup>209</sup>

The marriage equality movement's appeal to illegitimacy echoes this long-standing inattention to issues of race, intersectionality, and coalition-building within the mainstream LGBT rights movement.<sup>210</sup> The notion of illegitimacy as an injury associated with racial minorities who can get married but do not, further marginalizes racial minorities within the LGBT rights movement. It disassociates the LGBT rights movement from those most closely associated with illegitimacy—African Americans. In so doing, the illegitimacy as injury argument helps construct a portrait of gay life in which those who are both sexual minorities and racial minorities are rendered liminal, while highlighting the distinction between respectable gay couples and those who willfully live and raise children outside of marriage.

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[http://www.advocate.com/News/Daily\\_News/2008/11/16/Gay\\_is\\_the\\_New\\_Black/](http://www.advocate.com/News/Daily_News/2008/11/16/Gay_is_the_New_Black/).

207. See Melissa Murray, *Marriage Rights and Parental Rights: Marriage, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 359 (2009) [hereinafter Murray, *Marriage Rights and Parental Rights*] (explaining how the Yes on 8 campaign successfully reframed its appeal to focus on individual rights and parental autonomy); see also Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1321 fig.1 (2010) (suggesting that support for Proposition 8 increased after a media campaign emphasizing the effect of legal recognition of same-sex marriage on public education, religious freedom, and parental authority over children).

208. Carbado & Robinson, *supra* note 204.

209. *Id.*; see also Darren Lenard Hutchinson, "Gay Rights" for Gay Whites?: Race, Sexual Identity, and Equal Protection Discourse, 85 CORNELL L. REV. 1358, 1372 (2000) [hereinafter Hutchinson, *Gay Rights*] (noting the exclusion of "persons of color and the poor from pro-gay and lesbian equality discourse," and the concomitant "construction of the gay and lesbian community as white and economically privileged").

210. See generally Hutchinson, *Gay Rights*, *supra* note 209, at 1368-72 (discussing the racial character of the LGBT rights movement); R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CALIF. L. REV. 839, 867-68 (2008) (discussing the "operation of white racism and privilege within the LGBT rights movement").

## 2. *Obscuring Structural Impediments to Marriage*

Not only does the joinder of illegitimacy with same-sex marriage claims further entrench the racialized notions of illegitimacy and gay life, it also insists upon the inevitability and availability of marriage for all who are eligible for the institution. On this account, the decision to live outside of marriage seems particularly unorthodox, and indeed, deviant. To wit, there is little critical reflection on the many reasons individuals—whether gay or straight—might choose *not* to marry; nor is there consideration of the structural impediments that might limit the opportunities for, and the desirability of, marriage for some.

But these concerns warrant greater attention, particularly in view of the way that illegitimacy has been raced and classed. Russell Robinson's work is instructive on this point. As Robinson notes, "[l]aw and social norms create structures that channel and limit" romantic and sexual opportunities.<sup>211</sup> These structural impediments include a range of socio-legal structures such as the prison system and patterns of residential segregation, as well as cultural and aesthetic preferences.<sup>212</sup> Though these structural impediments are diverse, they all may impact each individual's social environments, and in doing so, "determine[], in part, the romantic possibilities and inclinations we imagine, express, and pursue."<sup>213</sup>

Attention to these structural impediments provides a more nuanced lens through which to consider illegitimacy and the decision to live an intimate life outside of marriage. Consider the association of illegitimacy with African American women. Though it is true that marriage rates of African Americans are the lowest of any racial subgroup in the United States,<sup>214</sup> this empirical portrait alone does little to identify the many factors that contribute to this phenomenon. Some African American women do not wish to marry, but according to empirical and anecdotal evidence, some do. Those who wish to marry may be limited in doing so by a dearth of suitable

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211. Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 *FORDHAM L. REV.* 2787, 2788 (2008) [hereinafter Robinson, *Structural Dimensions*].

212. Robinson, *Racing the Closet*, *supra* note 203, at 1496, 1502-04 (describing various structural impediments that limit the romantic possibilities of African Americans). In addition to the structural impediments identified by these scholars, we should also consider the economic and social inequalities that racial minorities face as structures that shape romantic preferences and opportunities. *Id.* at 1502. For example, in an effort to deal with discrimination in the workplace, racial minorities may prefer a romantic partner who is also a racial minority and likely to identify with these concerns. See Allison Samuels, *Time To Tell It Like It Is*, *NEWSWEEK*, Mar. 3, 2003, at 52-55.

213. Robinson, *Structural Dimensions*, *supra* note 211, at 2788.

214. Jones, *supra* note 194 (reporting that "[t]he marriage rate for African Americans has been dropping since the 1960s, and today [African Americans] have the lowest marriage rate of any racial group in the United States").

partners, or by other concerns.<sup>215</sup>

These concerns speak directly to Robinson's discussion of socio-legal structures.<sup>216</sup> For many African American women, the legacy of slavery, coupled with continued discrimination in the workplace and other aspects of public life, militates in favor of intraracial marriage and against outmarriage.<sup>217</sup> For these women, residential segregation, the staggering rate of incarceration and ongoing supervision by the criminal justice system, and differing rates of educational and employment achievement, may sharply limit the number of African American men who are considered eligible and available for marriage.<sup>218</sup> For those who identify as gay or bisexual, the burden of being both a racial and a sexual minority, as well as limited legal recognition of same-sex couplings, may delay the decision to come out publicly, further limiting one's options for romantic partners.<sup>219</sup>

Marriage's norms of financial interdependence with a partner and financial independence from the state may also explain lower marriage rates among African Americans (and other groups). Married couples are expected to provide for each other, privatizing the dependence of their family unit.<sup>220</sup> Indeed, the recent effort to promote marriage among those

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215. Kathryn Edin, *What Do Low-Income Single Mothers Say About Marriage?*, 47 SOC. PROB. 112, 113 (2000); Jones, *supra* note 194 ("My observation is that black women in their twenties and early thirties want to marry and commit at a time when black men their age are more likely to enjoy playing the field. As the woman realizes that a good marriage may not be as possible or sustainable as she would like, her focus turns to having a baby, or possibly improving her job status, perhaps by returning to school or investing more energy in her career.").

216. Robinson, *Racing the Closet*, *supra* note 203, at 1503-04 (purporting that a range of structural impediments—from the mass incarceration of African American men to the higher educational achievement rates of African American women—help explain low marriage rates among the African American community); *see also* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272 (2004) (noting that "nearly one-third of black men in their twenties are under the supervision of the criminal justice system").

217. *See* RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE & ROMANCE* 6, 103 (2001) (reporting that more than 93% of African Americans marry intraracially); BANKS, *supra* note 158, at 122 (discussing low rates of interracial marriage among African American women); R. Richard Banks & Su Jin Gatlin, *African American Intimacy: The Racial Gap in Marriage*, 11 MICH. J. RACE & L. 115, 130 (2005) (reporting that, of all racial minority groups, African American women are the least likely to marry interracial).

218. Robinson, *Racing the Closet*, *supra* note 203, at 1502.

219. *See* Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 603-10 (1997) (charting how the "coming out" process stressed by the majoritarian gay and lesbian community disparately impacts homosexuals of color because of their race and class); William R. Macklin, *Black Gays Say Race Often Outweighs Orientation*, PHIL. INQUIRER, Feb. 25, 1998, at D1 (noting that homosexuals of color do not experience the same sense of freedom from the coming out process as gay, white males).

220. Murray, *Marriage as Punishment*, *supra* note 29, at 45.

receiving public assistance explicitly articulated this claim—marriage would allow poor men and women to pool their resources to meet their needs, freeing them from dependence on the public fisc.<sup>221</sup> However, for many racial minorities, these outsized expectations can be difficult to meet. Uneven employment prospects, a persistent wage gap relative to other groups, and continued discrimination in and outside of the workplace may make compliance with these familial norms elusive, if not impossible.<sup>222</sup>

All of this affects romantic options and choices. For those African American women and men who achieve financial success, marriage to a partner who is not similarly situated can be seen as undesirable or even risky to one's long-term financial prospects.<sup>223</sup> Accordingly, instead of waiting for suitable partners to materialize, some individuals may choose to have relationships and raise children outside of marriage and its expectations.<sup>224</sup>

Attention to these structural elements of romantic and sexual decision-making often is missing from the marriage equality debate. And the consequences of this inattention are enormous. Constructing marriage as a choice that *should* be exercised if one is eligible renders invisible the constraints that make marriage a practical impossibility for the poor and working class, even if it is legally possible. And perversely, the economic misfortunes of this underclass are blamed on their "choice" to forego marriage, when in fact their economic marginality may *precede* the decision to forego marriage.

Instead of recognizing the considerable impediments to marriage that some individuals and groups may face, raising children outside of marriage is framed as either the product of an impermissible injustice that stigmatizes and demeans otherwise worthy families, or an unorthodox decision that signals one's deviance from accepted familial norms. At no point are illegitimacy and life outside of marriage presented as a rational means of dealing with the structural impediments that make adherence to traditional family norms elusive or even undesirable.

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221. Murray, *Marriage Rights and Parental Rights*, *supra* note 207, at 404 (noting that the marriage promotion initiatives were "offered as an effective way to privatize economic dependency, eliminating the need for public support and intervention"); Onwuachi-Willig, *supra* note 28, at 1648 (discussing Congress's "imposition of a marital solution to poverty").

222. BANKS, *supra* note 158, at 41-44; Onwuachi-Willig, *supra* note 28, at 1683.

223. Edin, *supra* note 215, at 121.

224. Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 855 (2004) (discussing the transformation in the meaning of marriage, especially for lower-income individuals for whom marriage is "a much sought-after but elusive goal"); *see also* KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 112 (2005) (showing that poor people believe "it is vitally important that both [women] and their male partners be economically set prior to marriage").

### 3. *Entrenching the "Private" Family and Obscuring the "Queer" Family*

Of course, there are those for whom structural impediments and other obstacles to marriage are of no consequence. For these individuals, the decision to avoid marriage is not due to a lack of options or financial constraints, but due to disinterest in the institution as a conduit to family formation. These individuals might be seen as pioneers in an effort to "queer" the family by embracing a wider array of family forms. The linking of illegitimacy with claims for marriage equality obscures these individuals and their efforts to broaden our understanding of "family." The illegitimacy as injury argument accepts without challenging the neoliberal project of consigning responsibility for vulnerable individuals to the private sphere and the family.<sup>225</sup> In so doing, it further entrenches the normative primacy of the marital family and stymies efforts to think broadly about more pluralistic modes of kinship and belonging and more robust state support for caregiving.

As a number of scholars have noted, the neoliberal political project has, since the 1960s (but with greater fervor since the 1980s), focused on dismantling the social safety net erected in the wake of the New Deal and the Great Society.<sup>226</sup> As an alternative to this system of public support, the neoliberal agenda has advocated a politics that emphasizes public deregulation, the assumption of private responsibility, and the family as a core site for the privatization of dependency.<sup>227</sup>

These political developments might, at first blush, seem wholly at odds with the marriage equality movement.<sup>228</sup> After all, the neoliberal agenda has been endorsed by groups that are apparently hostile to the prospect of gay civil rights, and certainly to same-sex marriage.<sup>229</sup> But interestingly, there are strong points of alignment between the neoliberal project and those who favor extending civil marriage to include same-sex couples.<sup>230</sup>

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225. This neoliberal agenda is represented by projects like the Family Leader's THE MARRIAGE VOW—A DECLARATION OF DEPENDENCE UPON MARRIAGE AND FAMILY. See *supra* pp. 388-89.

226. Angela Harris et al., *From "The Art of War" to "Being Peace": Mindfulness and Community Lawyering in a Neoliberal Age*, 95 CALIF. L. REV. 2073, 2088-89 (2007).

227. DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005); Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1541-42 (2006).

228. Gustafson, *supra* note 202, at 297-98.

229. *Id.* at 298 (noting that those who favor marriage promotion efforts as a cure for social ills are "staunchly opposed to same sex marriage").

230. LISA DUGGAN, THE TWILIGHT OF EQUALITY: NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY 50 (2003) (recognizing the privatizing impulses that characterize both neoliberalism and the mainstream LGBT rights movement); DAVID L. ENG, THE FEELING OF KINSHIP: QUEER LIBERALISM AND THE RACIALIZATION OF INTIMACY 26-31 (2010) (noting the emphasis on privatization,

The marriage equality movement's invocation of illegitimacy as injury is one such point of alignment, emphasizing the degree to which this facet of the LGBT rights movement has, perhaps unintentionally, signed on to the neoliberal vision of the private family.

Though marriage equality advocates maintain that their aims are discrete and self-contained, and may in fact have the subversive effect of rendering marriage more egalitarian and progressive,<sup>231</sup> critical aspects of their project accord with the neoliberal vision of the private (and privatized) family. As previously discussed, in recent years, the marriage equality campaign has focused on portraying the "sameness" of same-sex couples relative to their opposite-sex counterparts.<sup>232</sup> From the selection of plaintiffs to the arguments advanced in briefs and in the media, the gay rights position on same-sex marriage is framed as a question of equal civil rights—treating likes (that is, respectable, normal, monogamous, child-rearing families) alike, whether straight or gay.<sup>233</sup> The campaign's strategy admits no acknowledgement—much less embrace—of difference or queer life. The bathhouse is again closeted, along with the drag queens, leather-folk, and other denizens of the queer demimonde. Instead, marriage equality underwrites a commitment to the neoliberal values of normalcy, personal responsibility, and domesticity that undergird marriage and the marital family.

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personal responsibility, and respectability in neoliberalism and queer liberalism).

231. Jyl Josephson, *Citizenship, Same-Sex Marriage, and Feminist Critiques of Marriage*, 3 PERSP. ON POL. 269, 276 (2005) (suggesting that the advent of same-sex marriage might force people to question "the necessity of a gendered division of labor in marriage"); Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, in FAMILIES IN THE U.S.: KINSHIP AND DOMESTIC POLITICS 475, 479 (Karen V. Hansen & Anita Iltis eds., 1998) ("Extending the right to marry to gay people . . . can be one of the means . . . through which the institution [of marriage] divests itself of the sexist trappings of the past."). But see Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535 (1993) [hereinafter Polikoff, *We Will Get What We Ask For*] (arguing that same-sex marriage will not effectively alter the gendered nature of traditional marriage).

232. Courtney Megan Cahill, *Disgust and the Problematic Politics of Similarity*, 109 MICH. L. REV. 943, 950 (2011) (reviewing MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION & CONSTITUTIONAL LAW (2010)) ("Legal advocacy for marriage equality has overwhelmingly relied on a litigation strategy that posits that the state violates constitutional liberty and equality norms when it denies same-sex couples the right to marry because those couples are similarly situated in nearly every respect to their cross-sex counterparts."); Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361, 1366 (2005) (discussing the "like-straight" arguments that have been deployed in marriage-equality advocacy); see also Catherine Smith, *Queer as Black Folk?*, 2007 WIS. L. REV. 379, 382 (discussing the same-sex marriage movement's efforts to analogize discrimination against LGBT individuals to racial discrimination).

233. This is not an unreasonable litigation strategy. See Elizabeth Glazer, *Sexual Reorientation*, 100 GEO. L.J. (forthcoming 2012). However, as I discuss, this strategy has costs. See *supra* pp. 423-35.

For example, an implicit assumption of the campaign and its strategy is the uncritical acceptance of marriage as the de facto social safety net through which the needs of vulnerable individuals are accommodated.<sup>234</sup> There is no effort to think critically about the state's role in providing for the vulnerable beyond the conferral of legal recognition upon adult couples (and the panoply of public and private benefits that such recognition brings). More problematically, the illegitimacy as injury argument not only juxtaposes the respectability of the litigation's "perfect" plaintiffs against those who willfully deviate from the marital family form, it immediately conjures up the dangers of unstable, insecure families who likely will be required to enlist the state's assistance to accommodate their dependency.

Further, the movement's invocation of illegitimacy is concerning in that it marginalizes attempts to render legible as "families" kinship structures that depart from the nuclear marital family. For those families that exist outside of marriage, there may be a plurality of kinship structures and forms that are deployed—single parent-headed families, families that include or rely upon extended families or fictive kin, urban "tribes" of friends, and polyamorous groups, to name a few.<sup>235</sup> Because the joinder of marriage equality and illegitimacy underscores the "normalcy" of those seeking marriage rights while simultaneously distancing them from the deviant families who have willfully elected to live outside of marriage, opportunities to imagine and validate alternative kinship structures are lost.

This loss is at once ironic and deeply problematic. It is ironic because in the early days of the LGBT rights movement, there was a strong impulse to develop alternative family forms and structures.<sup>236</sup> In the 1980s, for example, "lesbians and gay men . . . began to speak widely of chosen families, the families they saw themselves creating as adults."<sup>237</sup> The emphasis on *chosen* families was a response to the fact that LGBT individuals were "ideologically excluded" from the traditional understanding of family, which was "by definition, heterosexual."<sup>238</sup> Marginalized and disfavored, LGBT individuals focused on "queering" the

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234. The marriage equality movement's routine invocation of the many public benefits with which marriage is associated illustrates this impulse.

235. Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 18-19 (2005).

236. David L. Eng, *Freedom and the Racialization of Intimacy: Lawrence v. Texas and the Emergence of Queer Liberalism*, in THE BLACKWELL COMPANION TO LGBT/Q STUDIES 41 (George Haggerty & Molly McGarry eds., 2007); Sonia K. Katyal, *The Dissident Citizen*, 57 UCLA L. REV. 1415, 1418 (2010).

237. Kath Weston, *Families in Queer States: The Rule of Law and the Politics of Recognition*, 93 RADICAL HIST. REV. 122, 130 (2005); see also Gustafson, *supra* note 202, at 300 ("LGBT families have commonly constructed families that transgress and transform notions of family.").

238. Weston, *supra* note 237, at 130.



family—creating meaningful alternatives to the traditional families from which they were legally excluded.

This account of “queering” the family likely will resonate with those familiar with the history of American slavery. Legally barred from marriage and precluded by the rigors of slavery from creating enduring family bonds, the African American community developed a range of non-traditional family structures.<sup>239</sup> Vestigial aspects of these structures persist in the modern African American community’s reliance on caregiving by extended family and fictive kin, and practices like “other-mothering.”<sup>240</sup>

I raise these historical antecedents to demonstrate the problematic aspect of the LGBT rights movement’s “uncritical solicitude”<sup>241</sup> of marriage and the marital family. The turn towards marriage is strongly assimilative, and as I have discussed, requires emphasizing the degree to which those seeking marriage equality are normal, respectable, and worthy.<sup>242</sup> But it also requires positioning those outside of marriage and the traditional marital family as deviant and unworthy.<sup>243</sup> In this way, the marriage equality movement’s embrace of the illegitimacy as injury argument permits the continued consolidation and entrenchment of the marital nuclear family as self-evidently worthwhile and valuable, and the denigration of family forms that depart from the marital model.<sup>244</sup>

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239. Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 256 (1999).

240. Murray, *The Networked Family*, *supra* note 34, at 392 (discussing these structures); *see also* Kessler, *supra* note 235, at 18-19 (describing alternative caregiving structures); Onwuachi-Willig, *supra* note 28, at 1690 (noting that “for many Blacks and Latinos ‘family’ extends beyond the traditional nuclear-family model of mother, father, and children”); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 269 (1995) (noting that “Blacks’ incorporation of extended kin and nonkin relationships into the notion of ‘family’ goes back at least to slavery”).

241. Spindelman, *supra* note 232, at 1375.

242. *See supra* Part IV.B.

243. *See* MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 82 (1999) (arguing that same-sex marriage further entrenches marriage’s normative priority, marginalizing those outside of marriage); Franke, *Domesticated Liberty*, *supra* note 52, at 1414 (arguing that the push for same-sex marriage rights has “created a path dependency that privileges privatized and domesticated rights and legal liabilities, while rendering less viable projects that advance nonnormative notions of kinship, intimacy, and sexuality”); Polikoff, *We Will Get What We Ask For*, *supra* note 231, at 1546 (considering the consequences of “valuing one form of human relationship above all others”).

244. Gustafson, *supra* note 202, at 300 (“Still, much of the LGBT rights movement has been focused on marriage in the last few years, reinforcing rather than re-envisioning notions of family.”). Importantly, the fixation on marriage and the marital family that undergirds the marriage equality movement is less present in other gay rights advocacy initiatives. In other venues—cases involving artificial reproductive technology and the rights of non-biological co-parents, for example—gay rights advocates often decouple parenthood from marriage in an effort to honor “chosen” LGBT families. *See* GAY AND LESBIAN ADVOCATES AND DEFENDERS, *PROTECTING FAMILIES: STANDARDS FOR CHILD CUSTODY IN SAME-SEX RELATIONSHIPS* (1999),

But more importantly, the denigration of non-normative family forms is especially concerning because it indicates a lost opportunity for building strong coalitions between the LGBT rights movement and those who historically have been marginalized, whether because of gender, race, ethnicity, or sexual orientation.<sup>245</sup> As history attests, racial minorities and sexual minorities have, at one time or another, been denied legal recognition as families. The danger of the marriage equality movement's uncritical embrace of the illegitimacy as injury argument is that it implicitly endorses the marginalization of outlaw families, even as it fights for the right to be in-laws.

To be clear, this critique of the marriage equality movement's use of illegitimacy (and its other strategic choices) is not intended to signal my disagreement with the underlying issue regarding the scope and nature of the right to marry. Let me be clear about this. I support marriage equality and favor the expansion of civil marriage to include same-sex couples. But I would also favor greater support for *all* families, however constituted.<sup>246</sup>

Accordingly, I am troubled by the increasing prominence of the illegitimacy as injury argument in the marriage equality effort and what it portends for families, whether marital or not. This Essay is an attempt to ventilate these concerns—to suggest that perhaps the marriage equality movement's effort to render legible the injury of illegitimacy that is wrought by the exclusion of gays and lesbians from civil marriage has injurious consequences of its own.

#### CONCLUSION—THE (REAL) NEW ILLEGITIMACY

This Essay began by challenging the idea of a “new illegitimacy.” As the doctrinal analyses presented make clear, the narrative that proceeds from the common law's strong disfavor of illegitimacy to a more

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available at <http://www.glad.org/uploads/docs/publications/protecting-families.pdf>.

245. Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 J. LESBIAN & GAY STUD. 437, 457 (1997) (“[O]ne of the great failings of queer theory and especially queer politics has been their inability to incorporate into analysis of the world and strategies for political mobilization the roles that race, class, and gender play in defining people's differing relations to dominant and normalizing power.”); Kate Kendell, *Race, Same-Sex Marriage, and White Privilege: The Problem with Civil Rights Analogies*, 17 YALE J.L. & FEMINISM 133, 137 (2005) (“Linkages and alliances are essential to the liberation of all queers.”). For a thoughtful discussion of other lost opportunities for LGBT rights coalition-building, see Kathryn R. Abrams, *Elusive Coalitions: Reconsidering the Politics of Gender and Sexuality*, 57 UCLA L. REV. 1135 (2010).

246. I am not alone in this call for action. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 228-36 (1995) (calling for a shift in support from the marital family to the “caregiving dyad”); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008) (calling for greater support for families, whether married or not).

liberalized period ushered in by *Levy* and *Glona* is far less progressive than has been perceived. In fact, *Levy* and *Glona* did not herald an uncritical acceptance of illegitimacy, but rather offered limited protections for those whose non-marital lives were more proximate to marital family norms and ideals. With this in mind, the marriage equality movement's appeal to the illegitimacy as injury argument is merely an outgrowth of the prioritization of marriage over non-marriage.

But perhaps there *is* a new(ish) illegitimacy afoot. It is not illegitimacy in the traditional sense—a definition that encompasses non-marital birth status. Instead, this new(ish) illegitimacy focuses more broadly on valuing certain choices, while marginalizing—if not demonizing—others. The new illegitimacy is rooted in neoliberalism, marriage, and the family structures this myopic set of political commitments engenders and privileges. It credits and values marriage and the marital family above all other family structures, and it gauges the value of non-marital family structures with regard to their proximity to, or distance from, marriage. And in doing so, this new illegitimacy precludes a nuanced critique of marriage and the racialized dimensions of illegitimacy and non-marriage, obscures the structural challenges that make marriage elusive or undesirable for many, and stymies the acceptance and proliferation of alternative family structures.

This is not to say that marriage and the marital family are not valued or valuable. It is to say that these structures need not be the only means by which we bind ourselves to those we care about and love. In linking illegitimacy to the ongoing struggle for marriage equality, LGBT rights advocates have tapped into a powerful rhetorical tool that clearly identifies the legal and social injuries that historically have befallen those outside of marriage's borders. But making this link has under-appreciated costs. In figuring illegitimacy as a traumatic injury, the argument consolidates marriage's privileged position as the normative ideal for intimate life. In doing so, it compounds the indignities and injuries faced by those who dare to live beyond marriage's borders.